Supreme Court, U.S.
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Case No. 95-1672

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

ROSA WARE, BOOKER T. WADE, JR., GWENDOLYN MAY-BARLOW, AND HOPE SMITH BYNUM, Joint Cross-Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the actions of the Federal Communications Commission in sequestering Rosa Ware, a natural person and party, from adverse witnesses at an administrative hearing are in conflict with Rule 615 (1) of the Federal Rules of Evidence and thus denied her "due process"?

Whether the Federal Communications Commission improperly disqualified Rosa Ware, Gwendolyn May-Barlow, and Hope Smith Bynum, although not finding them to have personally engaged in disqualifying misconduct, but merely associated with Booker T. Wade, Jr., whom was found to have engaged in disqualifying misconduct?

Whether the Federal Communications Commission, in conflict with precedent of this Court, improperly failed to use the "preponderance of [substantial] evidence" standard in disqualifying Booker T. Wade, Jr., and other parties to an administrative hearing and thus denied them "due process"?

Whether the Federal Communications Commission denied "due process" to Booker T. Wade, Jr., by disqualifying him based upon allegations in which he had no notice and thus improperly engaged in a "trial by ambush"?

Whether the Federal Communications Commission denied "due process" to Booker T. Wade, Jr., by disqualifying him based upon supposed representations by him which are not in the record?

Whether the Federal Communications Commission denied "due process" to Rosa Ware, Booker T. Wade, Jr., Gwendolyn May-Barlow, and Hope Smith Bynum by disqualifying them based upon a supposed FCC policy which does not exist?

PARTIES TO THE PROCEEDING

The following persons were also parties to the appeal before the United States Court of Appeals for the D.C. Circuit whose judgment is sought to be reviewed:

Black Television Workshop
of Los Angeles, Inc.
Mary V. Woodfork

The following persons were named as parties to the FCC proceeding on review, but did not appeal their disqualification to the U.S. Court of Appeals:

Dr. Clint Wilson
Gary Cordell
Roy Campanella, Jr.
Linda Pate
Titilola Payne Parker
Jerrome Duncan

Black Television Workshop of Los Angeles, Inc. was not named as a party to the FCC proceeding, but did participate as a party in the appeal to the U.S. Court of Appeals for the D.C. Circuit.

Black Television Workshop of Los Angeles, Inc. is a California non-profit and non-stock corporation, which was incorporated in 1981. It is governed by a multi-member board of directors. The corporation is not publicly owned, nor is it affiliated with any other entity. It has no parent

publicly issued. The sole activity of the corporation is to engage in television broadcasting. On October 3, 1994, the corporation filed for bankruptcy protection in the Federal Bankruptcy Court for the Central District of California. On February 23, 1995, the case was converted to Chapter 7 and Arnold L. Kupetz, Esq. was named Trustee (Case No. SV 94-45938KL).

The cross-petitioners, Rosa Ware, Booker T. Wade, Jr., Gwendolyn May-Barlow, and Hope Smith Bynum are natural persons and have served as officers and directors of Black Television Workshop.

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OPINIONS BELOW

The decisions of the Federal Communications Commission ("FCC"), and the interlocutory order, final judgment, and orders on rehearing and hearing in banc of the U.S. Court of Appeals for the D.C. Circuit, denying the relief requested by the joint cross-petitioners are cited in the Table of Authorities herein. The decisions are included in the Appendix of petitioner Black Television Workshop of Los Angeles, Inc. (docketed April 17, 1996). The orders and judgment of the D.C. Circuit are unreported.

The Appendix submitted by Black Television Workshop is cited herein as (BTW App.). The joint cross-petitioners are also submitting a Joint Appendix in a separate volume. It is cited herein as (Jt. App.).

JURISDICTION

The FCC entered a final decision in this proceeding in Order, FCC 94-220, rel. September 1, 1994, 9 FCC Rcd 4477, which disqualified the cross-petitioners as broadcast permittees or licensees. The Order of the FCC also revoked the construction permit for non-commercial Channel 68, Los Angeles, California, which is held by Black Television Workshop of Los Angeles, Inc. The cross-petitioners serve as directors of the corporation (Jt. App. 108a).

A timely appeal of the Order of the FCC was filed with the U.S. Court of Appeals for the D.C. Circuit. It entered an interlocutory order on December 5, 1994, denying the cross-petitioners' motion for summary reversal of the decisions of the FCC as to their individual qualifications to be broadcast permittees or licensees (BTW App. 1a-3a).

A final judgment in the case was entered on September 18, 1995, which denied the appeal of the cross-petitioners and which upheld the revocation of the Channel 68 construction permit. A petition for rehearing and suggestion for hearing in banc was denied on November 17, 1995 (Case No. 94-1031 and Consolidated Case No. 94-1655) (BTW App. 5a-11a).

Black Television Workshop of Los Angeles, Inc., a party to the proceeding, timely filed a petition for writ of certiorari on February 14, 1996. By letter of February 15, 1996, the Clerk granted Black Television Workshop leave to refile its petition by April 15, 1996. The petition was refiled by that date and docketed on April 17, 1996.

The jurisdiction of this Court was timely invoked by Black Television Workshop, pursuant to 28 U.S.C. Section 1254 (1). The cross-petitioners rely upon U.S. Supreme Court Rule 12.5 to file their cross-petition, which is timely filed by May 17, 1996. The Solicitor General and the FCC have been served with this cross-petition.

STATUTORY AND OTHER PROVISIONS INVOLVED

The statutory and other provisions cited herein, which are 47 U.S.C. 309, 47 U.S.C. 312, 47 C.F.R. 1.351, and Rule 615 (1) of the Federal Rules of Evidence, are set forth in the Joint Appendix (Jt. App. 121a-124a).

STATEMENT OF THE CASE

In Order to Show Cause, Hearing Designation Order, and Notice of Apparent Liability ("HDO"), 3 FCC Rcd 5443 (1988), the FCC designated for revocation the construction permit of Black Television Workshop of Los Angeles, Inc. ("Workshop") (Jt. App. 110a-116a). It is a non-stock and non-profit corporation governed by a multi-member board of directors. All of the directors are African-Americans (BTW App. 13a-18a).

The FCC granted to the corporation in 1983 the construction permit for non-commercial television Channel 68 in Los Angeles. This would be the only minority-controlled non-commercial television station in Los Angeles, which has one of the highest concentrations of minorities of any major metropolitan area. The construction permit was not granted pursuant to a minority preference policy (BTW App. 13a-18a).

The HDO was based upon a purported unauthorized transfer of control and unauthorized control of the corporation because of a change and/or deletion of directors without prior FCC approval (Jt. App. 110a-111a). However, the FCC has no articulated policy to determine whether a change and/or deletion of directors of a non-profit and non-stock entity results in a legally cognizable transfer of control or violates FCC rules. Transfers of Control of Non-Stock Entities, 4 FCC Rcd 3403 (1989).

The HDO resulted from the allegations of Mary V. Woodfork to the FCC Woodfork claimed that she was

unfairly removed as a director of the corporation in 1986. According to Woodfork, her removal was the result of the actions of Booker T. Wade, Jr., who had been serving as counsel to the corporation and later as an officer and director (Jt. App. 117a-120a). Wade had previously served as a Legal Assistant to an FCC Commissioner (Jt. App. 5a). He is one of the joint cross-petitioners herein.

The HDO also specified general issues of misrepresentation and/or lack of candor against Wade, Woodfork, and all of the current and former directors of the corporation. These persons are Rosa Ware, Gwendolyn May-Barlow, and Hope Smith Bynum, who are the other joint cross-petitioners herein, and Gary Cordell, Dr. Clint Wilson, Roy Campanella, Jr., Titilola Payne Parker, Linda Pate, Esq., and Jerrome Duncan, Esq. (Jt. App. 110a-116a).

Ware has continuously served as a director of Workshop since formation of the corporation in 1981. She is the sister of Wade. May-Barlow and Bynum began serving as directors in 1987. Woodfork, one of the original directors, disputes the election of May-Barlow and Bynum (Jt. App. 7a; BTW App. 110a-116a).

The specified issues resulted from Woodfork's generalized and undocumented allegations of attorney misconduct by Wade. The HDO failed to specify what misrepresentations or candorless statements may have been made or who made them (Jt. App. 110a-116a).

The Mass Media Bureau ("MMB") of the FCC issued a Bill of Particulars, on October 11, 1988. However, the

MMB failed to specify any allegations of misrepresentation, lack of candor, or other FCC misconduct by Ware, May-Barlow, or Bynum, which would justify their individual or personal disqualification. All of the purported misconduct by Wade is prior to the time that May-Barlow and Bynum became directors in 1987 (Jt. App. 117a-120a).

The HDO placed the burden of proceeding with the evidence and the burden of proof on the FCC. This is required by 47 U.S.C. 312 (d) (Jt. App. 112a, 124a).

The MMB, which prosecuted the case, assumed the burden of proceeding with the evidence and the burden of proof for the FCC. It directed its case against Wade and focused on his purported misconduct as an attorney for the corporation. The primary witness against Wade was Woodfork (Jt. App. 1a-40a).

Woodfork's accusations are related to a supposed scheme first conceived by Wade in 1981 to take control of the corporation and to oust her as a director in 1986. Woodfork has demanded that the FCC determine May-Barlow and Bynum not to be legitimate directors of the corporation because they are associated with Wade. Woodfork considers herself to be the "true owner" of the corporation (Tr. 711-712, 910, 924-928).

Woodfork demanded that the FCC not allow Channel 68 to operate under the control of persons she considers illegitimate. She wanted the FCC to award her as an individual the construction permit for Channel 68. This is because in her view she exposed Wade's purported

wrongdoing in ousting her as a director of the corporation (Tr. 910, 927-928).

During pre-designation investigations and pre-hearing discovery, in the 1987-1992 time period, the FCC failed to depose Woodfork or any other prospective witnesses against Wade, or to preserve the testimony of any prospective witnesses adverse to Wade. The FCC had no notes as to interviews with Woodfork or other prospective witnesses (Tr. 153, 207-208).

During pre-hearing discovery, the MMB declined to depose Ware, May-Barlow, and Bynum. However, as parties to the proceeding, they produced voluminous corporate documents in response to requests for production of documents from the MMB. Prior to designation for hearing, they assisted in providing voluminous corporate documents to the FCC in response to its investigation of the corporation.

At the hearing, the MMB declined to call May-Barlow and Bynum to testify. No evidence was adduced at the hearing that either May-Barlow or Bynum engaged in any misrepresentation or lack of candor, or other disqualifying misconduct (Jt. App. 1a-40a).

Ware testified at the hearing at the request of the MMB. During the hearing, the ALJ sequestered Ware from Woodfork and other adverse witnesses and ordered her counsel not to disclose to her any testimony by adverse witnesses (Tr. 493-517).

The purpose of this tactic was to prevent Ware from knowing the testimony of Woodfork until after Ware had testified. The MMB had refused to disclose, prior to the hearing, the testimony of Woodfork, or other witnesses adverse to Ware.

Wade did not testify at the hearing. The MMB, which had the burden of proceeding with the evidence and the burden of proof, failed to subpoena him. The MMB declined to move to dismiss Wade as a party to the proceeding, even though the ALJ directed it to file such a motion (Tr. 1590, 1831-1832). The MMB further declined to submit into evidence Wade's deposition testimony and answers to interrogatories, even though directed to do so by the ALJ (Tr. 1586-1589, 1802, 1807-1808).

In the Initial Decision ("I.D."), 7 FCC Rcd 7819 (1992), the ALJ uncritically accepted at face value the testimony of Woodfork which demonized Wade as engaging in purported misconduct by assuming control of the corporation and in ousting her as a director. This testimony was first given in 1992 and relates to events in the 1981-1986 time period (Jt. App. 1a-40a).

The I.D., paras. 110-118, made conclusions of misrepresentation and lack of candor by Wade, but contains no citations to the record of any evidence of intent to deceive of knowledge of any falsity. Although Wade did not testify, he was disqualified as a FCC permittee (Jt. App. 49a-53a).

The I.D. revoked the construction permit of the corporation. This was because of a purported abdication of

control to Wade by the directors and/or unauthorized transfer of control of the permit by Wade resulting from a change of directors without prior FCC approval. I.D., para. 124 (Jt. App. 55a-56a).

The I.D. disqualified as individual FCC permittees or licensees all of the former and current directors. This included Ware, May-Barlow, and Bynum. Such blanket disqualification also included two former directors who were not deposed by the MMB and were not called to testify at the hearing. Those persons never participated in the proceeding as parties and thereby failed to appeal their disqualification. I.D., paras. 121, 124-127 (Jt. App. 54a-56a).

The I.D., paras. 121, 125-127, disqualified Ware for abdication of control of the permittee and/or assisting in an unauthorized transfer of control without prior FCC authorization. No findings or conclusions as to misrepresentation or lack of candor, or other disqualifying misconduct, by Ware were made. No findings or conclusions of intent to deceive, or knowledge of any falsity, by her were made (Jt. App. 1a-40a, 55a-56a).

The I.D., paras. 121, 124-127, disqualified May-Barlow and Bynum. No findings or conclusions as to misrepresentation or lack of candor, or disqualifying misconduct, by them were made. No findings or conclusions of intent to deceive, or knowledge of any falsity, by them were made. The I.D. failed to give any intelligible reason for their disqualification (Jt. App. 1a-40a, 55a-56a).

All of the findings and conclusions of the I.D. relate

to purported attorney misconduct by Wade in the 1981-1986 time period. This was before May and Bynum became directors of the corporation in 1987 (Jt. App. 1a-40a).

Even though the I.D. found that Wade had acted without authority from the corporation and was not an officer and director at the time, it nevertheless attributed his purported attorney misconduct to the corporation and its directors. However, no findings or conclusions were made against the corporation or its directors as to any disqualifying misconduct or intentional deceit. I.D., paras. 114, 117, and 121-131 (Jt. App. 51a, 53a, 55a-58a).

At the time of giving testimony against Wade at the 1992 hearing, Woodfork was not represented by counsel. Woodfork believed that she would be personally awarded the Channel 68 construction permit, if Wade was discredited. Neither the ALJ, nor the MMB hearing counsel, informed Woodfork at the hearing that she was a target for prosecution or disqualification (Jt. App. 1a-40a).

Woodfork was thereafter disqualified in the I.D., paras. 130-131, based upon her own testimony against Wade (Jt. App. 57a-58a). After being disqualified, Woodfork retained counsel and attempted to revise and recant her hearing testimony in post-hearing pleadings.

The FCC in Decision, 8 FCC Rcd 4192 (1993), affirmed the I.D. The disqualification of Ware was affirmed, at para. 28, because of abdication of control of the permittee. However, no findings or conclusions of misrepresentation or lack of candor, or disqualifying

misconduct, by her were made. No findings or conclusions of intent to deceive, or knowledge of any falsity, by her were made. Ware was only found not to be a credible witness. Decision, para. 9. (Jt. App. 1a-40a, 68a).

The Decision, paras. 11-13, 28, and n. 53, affirmed the disqualification of May-Barlow and Bynum. However, no intelligible reasons were given. No findings or conclusions of misrepresentation or lack of candor, or disqualifying misconduct, by them were made. No findings or conclusions of intent to deceive, or knowledge of any falsity, by them were made (Jt. App. 1a-40a, 72a, 90a-91a).

Reconsideration of the Decision was denied in Memorandum Opinion and Order ("MO&O"), 8 FCC Rcd 8719 (1993). It declined to address the issue as to whether there is any factual or legal basis for the disqualification of Ware, May-Barlow, and Bynum (Jt. App. 94a-103a).

The MO&O, n. 11, suggested for the first time that Ware, May-Barlow, and Bynum were actually disqualified because of their supposed non-cooperation in the pre-designation investigation and their supposed disruption of the hearing (Jt. App. 102a). The MO&O failed to acknowledge that the hearing, which was held in downtown Los Angeles, was disrupted because of riots during the week of April 27-30, 1992. This resulted in several witnesses and named parties not appearing to testify and in the hearing being suspended in order to evacuate from the city.

Reconsideration of the MO&O was requested because the FCC relied upon a new rationale for disqualification.

This appeal was dismissed by the General Counsel, acting pursuant to delegated authority. Order, FCC 94I-013, rel. Feb. 15, 1994 (Jt. App. 104a-107a).

There was no substantive discussion in the Order as to the issues raised on reconsideration. The Order, para. 8, did state, but without any explanation, that because Ware, May-Barlow, and Bynum abdicated control of the permittee, they are culpable for whatever misconduct by Wade which occurred (Jt. App. 106a).

Because FCC rules prohibit an appeal to the Court of a delegated action by the staff, an application for review was filed with the FCC. The application for review was denied without comment in Order, FCC 94-220, rel. September 1, 1994, 9 FCC Rcd 4477 (Jt. App. 108a-109a).

Ware, Wade, May-Barlow, and Bynum timely appealed on October 3, 1994, their individual disqualification and also appealed the revocation of the construction permit to the U.S.Court of Appeals for the D.C. Circuit (Case No. 94-1655). A separate appeal had previously been filed by Woodfork as to her individual disqualification (Case No. 94-1031). The jurisdiction of the D.C. Circuit was pursuant to 47 U.S.C. 402 (b) (1), (5), and (6).

On October 3, 1994, Workshop, as a corporation, filed for Federal bankruptcy protection. On February 23, 1995, the case was converted to Chapter 7. Arnold L. Kupetz, Esq. was appointed Trustee (Case No. SV 94-45938KL, Central District of California). The intent of Kupetz is to sell the construction permit to a third-party

unrelated to the former or current directors in order to pay creditor claims of over $2,000,000 (BTW App. 19a-20a).

On September 18, 1995, the D.C. Circuit entered a final judgment denying the appeals. It held that there was "ample evidence" on the record to support the FCC's decision that the Channel 68 construction permit should be revoked and that Ware, Wade, May-Barlow, and Bynum are disqualified from "inheriting" the permit. A petition for rehearing and hearing in banc was denied on November 17, 1995 (BTW App. 5a-7a, 10a-11a).

Kupetz, as Trustee, filed on February 14, 1996, a petition for certiorari, on behalf of the corporation. It was docketed on April 17, 1996. The purpose of that petition is to require the FCC to abide by its policies and by Federal bankruptcy policy, which would allow the sale of a revoked broadcast permit to a third-party unrelated to the former or current directors in order to protect creditors.

This cross-petition of Ware, Wade, May-Barlow, and Bynum is with respect to their personal and individual qualifications to be an FCC broadcast permittee or licensee. They made no claim to the D.C. Circuit that they were attempting to "inherit" the Channel 68 construction permit from the bankruptcy Trustee and make no such claim to this Court. Their grievance before this Court is reputational injury and the redemption of their qualifications to be an FCC permittee or licensee of other broadcast stations.

SUMMARY OF ARGUMENTS

The FCC revoked the construction permit for what would only be the second African-American owned and controlled non-commercial television station in the nation. The FCC also disqualified all of its directors, who are African-Americans.

The revocation proceeding was initiated by the FCC in 1988 based upon changes in the directors of a non-profit corporation, which violate no FCC regulation and which are the subject of a pending rule making to determine if such changes should be regulated at all, or subject to a reporting requirement. The revocation proceeding was also initiated based upon conclusory and unspecified allegations of misrepresentation and lack of candor.

No specific allegations of deceit were made until after the hearing commenced in 1992 and relate to events in the 1981-1986 time period. The FCC declined to preserve any pre-hearing testimonial evidence from its witnesses. At the beginning of the hearing, the FCC refused to disclose the testimony of its witnesses and it sequestered parties from the adverse testimony of its witnesses. This was done to prevent the parties from knowing the specific allegations against them until after they testified.

The FCC based its case upon the testimony of Mary V. Woodfork, a dissident former director of the corporation. Woodfork believed that she would be personally awarded the FCC permit for the station as a reward for her testimony against Booker T. Wade, Jr., the corporation's legal counsel.

However, Woodfork was disqualified by the FCC based upon her own testimony against Wade. She was not represented by counsel at the hearing and was not advised by the ALJ or FCC counsel that she was a target for prosecution or disqualification. After the hearing, Woodfork retained counsel and attempted to revise and recant her testimony in post-hearing pleadings.

This case is actually about the FCC sanctioning Wade, an African-American, and one of its former attorneys and former Legal Assistant to an FCC Commissioner, because it disapproved of the manner in which he represented the non-profit corporation as legal counsel. The FCC believed that Wade was attempting to get rich from a broadcast permit and only "had his self-interest in mind" (Jt. App. 42a).

In a fit of pique, the FCC concluded that the directors had either encouraged Wade's involvement, as legal counsel, in the affairs of the corporation, or had done nothing about it, and thus themselves deserved punishment. The FCC, acting in a "blunderbuss," then punished the corporation and its directors by revoking its broadcast permit and disqualifying them.

The actions of the FCC were taken under the pretense of preventing a transfer of control of the corporation to Wade, as legal counsel, which was not authorized or approved by it in advance. The actions of the FCC were also taken under the pretense of punishing a supposed failure to inform it that such a transfer of control to Wade, as legal counsel, had occurred.

The FCC repeatedly violated its own rules, policies, and procedures in its vendetta to publicly humiliate Wade for committing the perceived "sin" of attempting to get rich from a broadcast permit. It conducted an extralegal "star chamber" proceeding against Wade, in what was also an attorney disciplinary proceeding against him as a former FCC employee. Such a cavalier disregard by the FCC for the "due process" rights of Wade and other petitioners, Ware, May-Barlow, and Bynum, requires that certiorari be granted.

REASONS FOR GRANTING THE PETITION

(a) The petition for writ of certiorari raises an important Federal question of law as to whether the actions of the FCC in sequestering Rosa Ware, a natural person and party, from adverse witnesses at the administrative hearing are in conflict with Rule 615 (1) of the Federal Rules of Evidence and thus denied her "due process"?

The petition for writ of certiorari raises an important Federal question of law as to whether the actions of the FCC in sequestering Rosa Ware, a natural person and party, from adverse witnesses are in conflict with Rule 615 (1) of the Federal Rules of Evidence. Such rules of evidence apply to FCC administrative hearings, pursuant to 47 C.F.R. 1.351. Because the actions of the FCC are in conflict with the Federal Rules of Evidence, certiorari should be granted.

During the hearing, the ALJ improperly sequestered Ware from Mary V. Woodfork, an adverse witness, and ordered Ware's counsel not to inform her of the testimony of

such adverse witnesses (Tr. 493-517). This action by the ALJ is in patent conflict with the Federal Rules of Evidence, Rule 615 (1), which allows a party who is a natural person to be present at all times to confront adverse witnesses.

Exemption from sequestration is automatic and not a matter of discretion. The purpose of Rule 615 (1) is to prevent problems as to confrontation and "due process" which would otherwise arise. Weinstein's Evidence, Vol. 3, Section 615 [02]; Advisory Committee's Note to Rule 615.

The refusal of the FCC to protect Ware's rights, as codified in the Federal Rules of Evidence, requires that her disqualification be vacated. Varlack v. SWC Caribbean, Inc., 550 F.2d 171, 175-176 (3rd Cir. 1977). Ware was disqualified as a result of the testimony of Woodfork.

The arguments of the FCC in rationalizing Ware's sequestration are inapposite (Jt. App. 70a-71a). According to the FCC, an individual testifying at an administrative hearing may be sequestered where that individual's presence is not necessary for the effective advocacy of the cause.

However, Ware was a party to the hearing and her own personal qualifications were under challenge. She had a right to be present to confront adverse witnesses in order to effectively advocate her own cause. See, Geders v. U.S., 425 U.S. 80, 88 (1975), the petitioner is not simply a witness, but also a defendant.

The reliance of the FCC on NLRB v. Stark, 525 F.2d 422, 429-430 (2nd Cir. 1975), cert. denied, 424 U.S. 967

(1976) is wholly misplaced. There, the persons to be sequestered were complainants, not parties subject to sanctions as is the case with Ware.

The FCC further argues that Ware was not prejudiced by sequestration from Woodfork or other adverse witnesses because she could have discussed their testimony with her counsel after she testified and then offered rebuttal evidence. However, this could be done by any party who is sequestered. If such procedure is effective to alleviate prejudice, then there would be no need to exclude any party from sequestration.

Accordingly, certiorari should be granted. The actions of the FCC are in conflict with the Federal Rules of Evidence and with precedent of other Circuits. The D.C. Circuit failed to address this issue of improper sequestration, although it was timely raised before the FCC and that Court.

> (b) The petition for writ of certiorari raises an important Federal question of law as to whether the FCC improperly disqualified or sanctioned Rosa Ware, Gwendolyn May-Barlow, and Hope Smith Bynum, although not finding them to have personally engaged in disqualifying misconduct, but merely associated with Booker T. Wade, Jr., who was found to have engaged in disqualifying misconduct?

The petition for writ of certiorari raises an important Federal question of law as to whether the FCC violates the

"due process" rights of parties to its administrative hearings by disqualifying or sanctioning them for the misconduct of other parties merely because of their association with the offending party. A Federal agency must conduct its proceedings in accordance with "due process." Goldberg v. Kelly, 397 U.S. 254, 266-267 (1970). The failure to do so requires that certiorari be granted.

The decisions of the FCC made no findings that Ware, May-Barlow, or Bynum personally engaged in any disqualifying misconduct. Indeed, the FCC, which had the burden of proceeding with the evidence and the burden of proof, declined to call May-Barlow and Bynum to testify at the hearing and did not put into the record any evidence adverse to them (Jt. App. 1a-40a). Ware, who was called to testify, was only found not to be a credible witness (Jt. App. 19a, 24a, 53a, 68a).

The FCC nevertheless disqualified Ware, May-Barlow, and Bynum because of their association with Booker T. Wade, Jr., who was the focus of the FCC's prosecution. Ware is the sister of Wade. May-Barlow was presumed to be Wade's cousin (Jt. App. 7a, 73a).

The decisions of the FCC repeatedly referred to Ware, May-Barlow, and Bynum as the "Wade Group." No meaningful attempt was made to distinguish the actions of Wade from their actions (Jt. App. 59a, 65a, 102a, 106a).

The findings and conclusions of the decisions of the FCC as to purported misconduct by Wade refer to the 1981-1986 time period. They do not address the period of time

(after 1986) in which May-Barlow and Bynum served as directors of the corporation (Jt. App. 1a-40a).

A Federal agency must "engage in a careful, individualized review of the evidence." Rhoa-Zamora v. INS, 971 F.2d 26, 33 (7th Cir. 1992), citing Kaczmarczyk v. INS, 933 F.2d 588, 595 (7th Cir. 1991), cert. denied, 112 S.Ct. 583 (1991). The failure of the FCC to do so requires that the disqualification of Ware, May-Barlow, and Bynum be vacated.

In order to justify disqualification, the FCC must establish the existence of misrepresentation or deceit by demonstrating the making of an intentional, material, and false statement by a party. High Country Communications, 4 FCC Rcd 6237, 6238, para. 9 (1989). A party must have knowledge of falsity in order to have intent to deceive. California Public Broadcasting Forum v. FCC, 752 F.2d 670, 679 (D.C. Cir. 1985).

There is no record evidence, or any findings or conclusions, of any knowingly false or misleading testimony presented to the FCC by Ware, May-Barlow, or Bynum. Nor is there any record evidence that information was intentionally withheld from the FCC by them, that inaccurate information was intentionally provided by them to the FCC, or that they had any knowledge of falsity (Jt. App. 1a-40a).

The FCC has itself cautioned against branding potential broadcasters as "liars," or of unfit character to be a permittee or licensee, without seeking or considering their explanations. This is especially so in contentious cases, such

as the one at hand. Bellingham Television Associates, Inc., 103 FCC2d 222, 225, para. 6 (Rev. Bd. 1986).

The actions of the FCC in disqualifying Ware, May-Barlow, and Bynum are particularly shameful because these persons who are the victims of its "blunderbuss" are African-American females. The policy of the FCC is to bring more minorities and women into broadcasting.

However, without any factual or legal basis, the FCC disqualified three African-American females from holding a broadcast permit or license. This would also disqualify them from holding a management position at a broadcast station. Such disqualification further stigmatizes them as being of unfit character, which would have an adverse effect on their credit rating, general employment prospects, and on their eligibility for licensing as professionals.

Accordingly, certiorari should be granted. The actions of the FCC are in conflict with fundamental principles of "due process" and with precedent of other Circuits requiring an "individualized" review of the evidence, not guilt by association or guilt by reason of "blood." The D.C. Circuit failed to address this issue, although it was raised by Ware, May-Barlow, and Bynum both before the FCC and that Court.

> (c) The petition for writ of certiorari raises an important Federal question of law as to whether the FCC, in conflict with precedent of this Court, improperly failed to use the "preponderance of [substantial] evidence" standard in disqualifying Booker T. Wade, Jr. and other parties to the administrative hearing and thus denied them "due process"?

The petition for writ of certiorari raises an important Federal question of law as to whether the FCC improperly failed to use the "preponderance of [substantial] evidence" standard in disqualifying Wade and other parties to the administrative hearing. The actions of the FCC are in direct conflict with Steadman v. SEC, 450 U.S. 91, 101 (1981).

As held in Steadman, in order for a Federal agency to impose sanctions, it must demonstrate disqualifying misconduct by a "preponderance of [substantial] evidence" and not by mere "substantial evidence." The FCC has acknowledged that, where it has the burden of proceeding with the evidence and the burden of proof, it must demonstrate that it is more likely than not that a party engaged in disqualifying misconduct and not merely infer that such misconduct occurred. Silver-Star Communications-Albany, Inc., 6 FCC Rcd 6905, 6906, para. 18 (1991).

However, in spite of this clear mandate from the Court as to the appropriate legal standard of proof to impose sanctions and its own acknowledgement of that legal standard, the FCC used the lesser "substantial evidence" standard against Wade and the other parties. In its brief

before the D.C. Circuit, the FCC admitted that it used this lesser standard. See, FCC appellee brief, pp. 22-25, filed May 18, 1995.

As defined by the FCC in its appellee brief, the "substantial evidence" standard only minimally requires it to find such relevant evidence in the record to support its decisions which a reasonable mind might accept as adequate to support a conclusion. Lindsay v. NSTB, 47 F.3d 1209, 1213 (D.C. Cir. 1995). As held in Consolo v. FMC, 383 U.S. 607, 620 (1966), "substantial evidence" is something less than the weight of the evidence.

Wade, Ware, May-Barlow, and Bynum raised on appeal the issue as to the appropriate evidentiary standard to use. The D.C. Circuit, in its Judgment, filed September 18, 1995, did not directly address this issue. Rather, it stated without explanation that there is "ample evidence" in the record to support the decisions of the FCC (BTW App. 6a-7a). However, an "ample evidence" standard has no legal meaning and the D.C. Circuit gave it none.

Accordingly, certiorari should be granted. The actions of the FCC are in conflict with precedent of this Court as to the proper legal standard of evidence or proof for a Federal agency to impose sanctions against a party.

(d) The petition for writ of certiorari raises an important question of Federal law as to whether the FCC denied "due process" to Booker T. Wade, Jr., by disqualifying him based upon allegations in which he had no notice and thus improperly engaged in a "trial by ambush"?

The petition for writ of certiorari raises an important Federal question of law as to whether the FCC denied "due process" to Wade by disqualifying him based upon allegations in which he had no notice and thus engaged in a "trial by ambush." From the beginning of this proceeding, the FCC prosecuted its case based upon secrecy and surprise.

Pursuant to 47 U.S.C. 309 (e), a hearing designation order shall specify with particularity the matters and things in issue and shall not include issues phrased generally. Univision Holdings, Inc., 8 FCC Rcd 3931, para. 3, 3932, paras. 6-7 (1993), general conclusory allegations are not acceptable. However, in violation of this Federal statutory requirement, the HDO only contained general conclusory allegations of misconduct against Wade. The bill of particulars was only slightly less vague (Jt. App. 110a-120a).

After designation for hearing in 1988, the FCC declined to take written statements or depositions from its witnesses. At the beginning of the hearing in 1992, the FCC refused to disclose the testimony of its witnesses. It also required the sequestration of Wade and Ware from adverse witnesses. This was done in order to prevent Wade and

Ware from knowing the testimony to be used against them.

The FCC based its case on the testimony of Woodfork. She first testified in 1992 as to events in the 1981-1986 time period. She had no notes from that period. When Woodfork first made complaints in 1987 to the FCC about Wade, it failed to take any effort to preserve her oral claims or testimonial evidence.

Woodfork alleged for the first time at the 1992 hearing, that Wade directed her in 1986 to sign in blank an FCC ownership report. Wade was disqualified for fraud and intentional misrepresentation based upon this allegation in which he had no prior notice (Jt. App. 29a, 51a). His purported fraud and misconduct was then attributed to Ware, May-Barlow, and Bynum, and the other parties (Jt. App. 56a, 106a).

These trial tactics by the FCC are in conflict with fundamental principles of "due process" and with precedent of this Court. In Re Ruffalo, 390 U.S. 544, 551 (1968), an agency is required to inform the accused of the charges before the hearing commences and cannot amend the charges on the basis of testimony it later elicits at the hearing.

Trials are not poker games in which prosecutors can conceal their cards until played. Williams v. Florida, 399 U.S. 78, 82 (1970). See also, Smith v. Estelle, 602 F.2d 694, 699 (5th Cir. 1979), surprise and secrecy by prosecutors prevent effective cross-examination by defendants in challenging the accuracy or materiality of evidence and thus cannot be condoned.

Accordingly, certiorari should be granted. The FCC must not be allowed to conduct a "trial by ambush." Not only do such tactics offend the Fifth Amendment requirement of "due process," but also implicate the First Amendment.

The FCC is the gatekeeper as to who is allowed to be a broadcaster. Its decisions as to who is disqualified from this public trust must be above reproach and not be tainted by improper trial tactics. This issue of lack of notice was raised before the D.C. Circuit, but not addressed.

> (e) The petition for writ of certiorari raises an important question of Federal law as to whether the FCC denied "due process" to Booker T. Wade, Jr., by disqualifying him based upon supposed representations by him which are not in the record?

The petition for writ of certiorari raises an important question of Federal law as to whether the FCC denied "due process" to Wade by disqualifying him based upon supposed representations by him which are not in the record. A Federal agency is required to base its decisions upon record evidence. 5 U.S.C. 706 (2) (F). The failure to do so is a basis for review by appellate courts.

The FCC found that Wade made intentional and knowing misrepresentations and lacked candor in not fully disclosing to it his involvement as an attorney in the affairs of the corporation (Jt. App. 53a). However, Wade did not testify at the hearing, because the FCC failed to subpoena him, and it declined to introduce into the record his

deposition testimony or written statements by him (Jt. App. 1a-40a). Thus, with no record evidence of any deceitful testimony or statements by Wade, there is no basis in law to disqualify him for intentional deceit.

Accordingly, certiorari should be granted. The actions of the FCC are in conflict with Morton v. Ruiz, 415 U.S. 199, 235 (1974), which requires Federal agencies to follow established rules and procedures. This issue was raised before the D.C. Circuit, but not addressed by it.

> (f) The petition for writ of certiorari raises an important Federal question of law as to whether the FCC denied "due process" to Rosa Ware, Booker T. Wade, Jr., Gwendolyn May-Barlow, and Hope Smith Bynum by disqualifying them based upon a supposed FCC policy which does not exist?

The petition for writ of certiorari raises an important question of Federal law as to whether the FCC denied "due process" to Ware, Wade, May-Barlow, and Bynum by disqualifying them based upon a supposed FCC policy which does not exist. Such actions by the FCC are in conflict with precedent of this Court.

The FCC does not have and never had a policy as to what constitutes a transfer of control of a non-commercial permittee or licensee because of changes in the board of directors, or because of the deletion of a director. Transfers of Control of Non-Stock Entities, 4 FCC Rcd 3403, para. 1, 3405, para. 14, n. 43 and 45 (1989); Seven Locks

Broadcasting Co., 94 FCC2d 899, 901-902 (1983). Thus, the legal premise of the HDO and of the FCC decisions, that as a result of Wade's involvement there was an unauthorized transfer of control of the corporate permittee because of changes in the composition of its board of directors and/or deletion of a director, is without any basis in law.

Although the FCC has authority to enforce the provisions of the Communications Act as to control of a permittee or licensee, it does not have authority to impose sanctions for violating a supposed policy which does not exist. It is contrary to fundamental principles of "due process" to sanction a party for conduct in which he or she had no notice was in violation of FCC policy. In Re Oliver, 333 U.S. 257, 273 (1948). See also, RKO General, Inc. v. FCC, 670 F.2d 215, 223-224 (D.C. Cir. 1981), an agency must give notice of its standards or policy and then apply that policy only after the policy is proclaimed to be in effect.

Regardless of the requirement of prior FCC approval for changes in directors of non-commercial entities, abdication of control or unauthorized transfer of control of a permittee or licensee is not disqualifying unless the abdication or transfer is accompanied by deceit. Silver Star 6 FCC Rcd at 6907, para. 20. See also, Spanish International Broadcasting, 2 FCC Rcd 3336, 3339, para. 20 (1987), unauthorized control was found which was not disclosed to the FCC, but no intent to conceal was inferred.

Where there is an abdication of control or unauthorized control, but which is not accompanied by deceit, FCC policy only requires the imposition of a

monetary forfeiture. Angel F. Ginorio, 9 FCC Rcd 698, 699 (1994). As previously noted, the FCC made no findings or conclusions of deceit by Ware, May-Barlow, or Bynum (Jt. App. 1a-40a). Thus, there is no basis in law to disqualify them for deceit as to abdication of control.

Accordingly, certiorari should be granted. The FCC disqualified Ware, Wade, May-Barlow, and Bynum based upon violation of a supposed FCC policy as to control of a non-profit entity which does not exist. This issue was raised before the D.C. Circuit, but not addressed by it.

CONCLUSIONS

WHEREFORE, in view of the foregoing, Ware, Wade, May-Barlow, and Bynum request that the Court grant certiorari and review the decisions of the FCC, and the decisions on appeal of the U.S. Court of Appeals for the D.C. Circuit, which improperly disqualified them as permittees or licensees of the FCC. The actions of the FCC are in conflict with fundamental principles of "due process" and are in conflict with precedent of this Court.

If the FCC's extralegal actions against Ware, Wade, May-Barlow, and Bynum are condoned --- putting them into an administrative hearing and disqualifying them with no semblance of fairness or "due process" --- then no broadcaster is safe from such regulatory abuse. Any broadcast station and its principals, who are not in favor with the FCC, for whatever reason, can be singled out with impunity for harassment or driven out of broadcasting. This is wholly contrary to the American system of justice.

Respectfully submitted,

By:_____

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

ROSA WARE, BOOKER T. WADE, JR.,
GWENDOLYN MAY-BARLOW, AND HOPE SMITH
BYNUM, Joint Cross-Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,
Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

JOINT APPENDIX FOR CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A --INITIAL DECISION, FCC 92D-66, rel. December 1, 1992, 7 FCC Rcd 7819 (1992)

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC.

Appearances

Stephen T. Yelverton, on behalf of Booker T. Wade, Rosa Ware, Gwendolyn May and Hope Smith Bynum; /1 Harry F. Cole, on behalf of Mary V. Woodfork; and Gary P. Schonman; on behalf of the Chief, Mass Media Bureau.

PRELIMINARY STATEMENT

1. On April 15, 1983 Black Television Workshop of Los Angeles, Inc. (BTW) received a permit to construct a noncommercial UHF television station on reserved Channel 68 to serve the Los Angeles area with the call letters KEEF-TV. After receiving four extensions of time to complete construction, BTW obtained program test authority in 1987 and commenced operation. However, soon thereafter, the Commission ordered KEEF-TV off the air because the station was operating at variance from the facilities authorized in its construction permit. The station has remained dark ever since.

2. In June 1987, BTW filed an application for modification of its construction permit and for a license to cover the proposed modified permit. However, in response to a series of pleadings prompted ny an informal objection to the application by Mary Woodfork and two other original BTW directors, the Commission instituted this proceeding to determine whether the permit should be revoked. Order to Show Cause, Hearing Designation Order and Notice of Apparent Liability, 3 FCC Rcd 5443 (1988) (HDO).

3. The issues specified for hearing in the HDO are as follows: (a) to determine whether control of the permittee corporation (BTW) was transferred without Commission approval, or exercised by persons not authorized to do so, in violation of Section 310(d) of the Communications Act; and, if so, whether such unauthorized control was due to the feasance, malfeasance, misfeasance, or nonfeasance (including but not limited to those actions mentioned in items (b) and (c), below) of the original eight directors [/2], or any of them, constituting BTW's board in 1983; the group of four directors[/3], or any of them, claiming to control BTW now; or any other persons or groups presently or formerly associated with BTW.

(b) To determine whether any of the aforementioned persons made misrepresentations to the Commission, were lacking in candor in their dealings with the Commission, or attempted to mislead or deceive the Commission as to the true ownership and control of the permittee in BTW's original permit application and related documents, in the subsequent above-captioned applications, in Ownership Reports and in pleadings filed with the Commission with respect to the past and current control of BTW.

(c) To determine whether any of the aforementioned persons violated Section 73.3613 (b) of the Commission's rules by failing to file the organizational documents required thereunder, including articles of incorporation and by laws and any amendments thereto, and by failing to report any agreements or understandings affecting ownership and control of the permittee.

(d) To determine, in light of the evidence adduced

under the foregoing issues, whether any of the persons or groups named above possesses the requisite qualifications to be or remain a permittee of the captioned television station.

(e) If, in light of the evidence adduced pursuant to the foregoing issues, it is determined that revocation of the permit for station KEEF-TV, Los Angeles, CA, is not warranted, to determine, pursuant to Section 309(e) of the Communications Act, whether grant of the captioned applications, or any of them, will serve the public interest, convenience, and necessity.

1/ Yelverton purports to represent Black Television Workshop of Los Angeles, Inc., as well as Booker T. Wade, Rosa Ware, Gwendolyn May and Hope Smith Bynum, individual parties claiming to now control BTW. For reasons discussed more fully in the Judge's MO&O, FCC 92M-805, released July 22, 1992, note 1, Yelverton does not represent the corporate entity and this initial decision will be treated as filed solely on behalf of the named individuals.

2/ In a footnote to the HDO, the term "original eight directors" was defined to include Mary Woodfork, Clint Wilson, Gary Cordell, Roy Campanella, Jr., Linda Pate, Titilola Payne Parker, Jerome Duncan, and Rosa Ware.

3/ In a footnote to the HDO, the Commission defined this group to include Booker T. Wade, Jr., Rosa Ware, Gwendolyn May, and Hope S. Smith.

4/ The hearing was initially scheduled to commence in Los Angeles on March 27, 1989. However, commencement of the hearing was delayed pending consideration of a stay request, motion to disqualify the Presiding Judge, and the fling of a distress sale application. These matters are fully

discussed in the Commission's Order, 7 FCC Rcd 2716 (1992) directing the proceeding to be expedited to the greatest extent possible consistent with due process and that any exceptions to the initial decision are to be submitted to the Commission. The burden of proceeding with the introduction of evidence and the burden of proof as to Issues (a) through (d),inclusive, were placed on the Mass Media Bureau. The burden of proceeding with the introduction of evidence and the burden of proof as to Issue (e) was placed on Black Television Workshop of Los Angeles, Inc. (BTW).

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4. Prehearing conferences were held on November 17, 1988, December 20, 1988, November 25, 1991, February 21, 1992, and March 4, 1992, all in Washington, D.C. An evidentiary admission session was held on March 17, 1989, also in Washington, D.C. Hearing sessions were held on April 27-30, 1992, in Los Angeles, California, /4 and on May 11, 1992 and May 15, 1992, in Washington, D.C. The record was closed on May 15, 1992. Tr. 1853, 1855. Pro posed findings of fact and conclusions of law were filed on June 26, 1992, and replies were filed on July 10, 1992.

5. To meet its burdens under issues (a) through (d), the Bureau moved into evidence more than 35 documentary exhibits, most of which were provided by Wade in his pre-designation "Opposition to Informal Objection," filed on November 23, 1987. The Bureau also directly examined a total of seven witnesses. They consisted of six out of the eight original BTW directors to whom the construction permit was granted: Mary Woodfork, Rosa Ware, Linda Pate, Roy Campanella II, Jerome Duncan, and Clint Wilson II. The Bureau also called as a witness, Michelle Moore, with whom Wade had had a personal relationship. /5 Wade, a party to this proceeding, was duly noticed by the

Mass Media Bureau to testify. However, Wade did not appear. No rebuttal case was proffered in response to the Bureau's direct presentation. In addition. BTW offered no direct case exhibits or testimony with respect to issue (e).

Findings of Fact

6. Booker T. Wade, Jr. (Wade) holds an undergraduate degree from the University of California at Los Angeles and a law degree from Stanford University. Wade served as a staff attorney at the Federal Communications Commission in the late 1970s. During part of his employment at the FCC, Wade served as a legal assistant to then Commissioner Tyrone Brown. Tr. 1243.

7. Wade left the FCC in approximately 1980, and, with two colleagues, Jim Winston and Sam Cooper, established a company called Community Television Network (CTN). Through CTN, Wade was involved in filing applications with the FCC for construction permits for low power television stations. Wade and his colleagues filed applications on behalf of other persons. They were also principals in some of the low-power applications that were filed. Bureau Ex. 1, p. 16; Tr. 1246, 1248.

5/ The Bureau did not seek the testimony of Titilola Payne Parker because of her express lack of recall about relevant matters. See Bureau's Reply filed July 10, 1992, paragraph 4. As noted by the Bureau, Wade's counsel intended to call Payne as a rebuttal witness but decided not to do so. Gary Cordell had been scheduled to testify in Los Angeles, but his appearance was cancelled because of the outbreak of riots there. In lieu of subpoenaing Cordell to testify in Washington, the Bureau sought to introduce a declaration previously signed by him (MMB Ex. 40). The exhibit was not received into the record (Tr. 1597).

8. Wade's short-term goal was to file as many low-power television applications as he could. His ultimate goal was to build a for-profit nationwide network of commercial low power stations that would be controlled by Wade and his colleagues. Tr. 524, 1243-1246, 1250, 1400-1401, 1617. Wade anticipated that if construction permits were granted, he would serve as an advisor in terms of getting the stations constructed, obtaining financing, and providing programming. Tr. 1248.

BTW's Formation And Initial Applications

9. Initially, Wade put together an application in the name of BTW for Channel 68 in Los Angeles as an LPTV station. Tr. 1263. There is little evidence in the record concerning that application, although it appears that Gary Cordell (Cordell), one of the eight directors originally listed in BTW's November 18, 1981 application for a full-power station, was among the principals in the BTW LPTV application. Bureau Ex. 1, p. 16.

10. After a mutually exclusive application for a noncommercial full-power television station was filed for Channel 68, Wade decided that he, too, would file a full-power application. Thus, on November 18, 1981, Wade, acting as legal counsel on behalf of BTW, filed an application for a construction permit for a new full-power noncommercial educational television station on Channel 68 in Los Angeles. Bureau Ex. 1; Tr. 1263-1264.

11. BTW was incorporated as a nonprofit "mutual benefit" corporation under the laws of the State of California on February 17, 1981. (Bureau Ex. 2). Although the application, as originally filed, referenced BTW's Articles of Incorporation (Bureau Ex. 1, p. 10), the Articles of Incorporation were not filed with the Commission until January 8, 1982, when Wade tendered an amendment to BTW's

application. Bureau Ex. 4, p. 5. There was, however, no reference in the application, as originally filed, to any by laws for BTW, and BTW never amended its application to submit any by-laws.

12. The full-power application for Channel 68 identified BTW's board as consisting of seven directors: Gary Cordell (Cordell), Rosa Ware (Ware), Jerrome Duncan (Duncan), Roy Campanella II (Campanella), Mary Woodfork (Woodfork), Titilola Payne Parker (Payne) and Linda Pate (Pate). The application reflects that all the named directors were appointed by Wade, denoted as the "Organizer." Bureau Ex. 1, p. 5. In an amendment filed on January 8, 1982, Wade notified the Commission that an eighth director, Clint Wilson II (Wilson) had been added to BTW's board. Bureau Ex. 4, p. 3.

13. With two exceptions (as to whom the record is silent), the evidence reflects that all of these persons were either friends or acquaintances of friends of Wade's. /6 Woodfork first met Wade while they ere at Stanford in the mid-1970's. Tr. 519. They shared a mutual friend. Tr. 519. When he began his LPTV business, Wade solicited Woodfork to participate in at least one application for the Hartford, Connecticut market. Tr. 530-531. Ware, a telephone operator, is Wade's sister. Tr. 943, 982. Duncan, an attorney in Los Angeles, had first encountered Wade through a mutual acquaintance, who happened to be one of Wade's

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6/ Woodfork graduated from Stanford University in 1974 with a B.S. in Biological Science and attended UCLA Medical School from 1974-1977. In 1976, she worked as Special Assistant to the Lieutenant Governor of California and in this capacity, she provided research on health program issues and helped draft position papers. Also, she taught

undergraduate level courses in pre-medicine and preventive medicine techniques and worked as a Project Coordinator at the University of Southern California specializing in geriatric care. Bureau Ex. 19, p. 7. She is currently self employed in medical management and consulting and medical legal editing. Tr. 518.

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business partners in his LPTV venture. Tr. 1530-1531. Duncan introduced Wade to Pate, an attorney in Los Angeles who shared office space with Duncan. Tr. 1129-1130. Campanella was a television producer working with one of Wade's colleagues and business partners. Tr. 1392. Wilson was a professor at School of Journalism at the University of Southern California when he was contacted by Wade about BTW. Tr. 1615. He had known Wade some 20 years earlier when Wilson was a professor and Wade was a student at Los Angeles City College. Tr. 1614-1615. The record does not reflect Wade's relationship with Payne or Cordell prior to the formation of BTW. With the exception of Duncan and Pate, who shared office space, it appears that none of the Original Eight Directors knew each other personally.

14. Wade told the directors that BTW's ultimate objective was to construct and place on the air a new noncommercial educational television station which would be minority owned and operated. It was anticipated that the station would serve the interests of the various minority communities in the Los Angeles area, primarily the African-American community. (Tr. 520, 947, 1132, 1394).

15. The possibility of a minority owned noncommercial television station in Los Angeles was the motivating factor in the directors' decision to participate in BTW. In Woodfork's words, she was "very excited about the possibilities" of such a station. Tr. 522. Pate stated that she understood

that BTW was proposing "the only black non-profit venture other than a television channel at Howard University. And I was very proud to be part of the fact that there would be a black, non-profit, public television channel in California." Tr. 1135. Campanella observed that the proposed station could serve as a nice communications bridge" which "possibly could offer the community a way of feeling empowered and able to express itself." Tr. 1425. Duncan understood BTW to be "an opportunity to do some public service here in Los Angeles." Tr. 1531. Wilson recalled BTW's plan to "primarily serve the black community of Los Angeles" with programming "educational in nature, some that would be informative, particularly of interest or service to the low income parts of the community." Tr. 1676.

16. At the time she accepted a position on BTW's board, Woodfork did not know who the other directors were or would be. Tr. 523. Nor did Wade describe to her what her duties would be as a director. Tr. 525. Woodfork did not see a copy of BTW's application until years after the construction permit was granted, Tr. 528, 935, and she does not recall having specifically authorized the filing of the application, despite a representation in the application to that effect. Bureau Ex. 1, p. 14; Tr. 529, 936. Woodfork was not even told by Wade that there was a competing application for Channel 68. Tr. 525. Furthermore, Wade did not discuss with Woodfork how long her term as a director would be, and Woodfork, having had no prior corporate experience, assumed she would function as a director in perpetuity. Tr. 543, 734-735, 804-805.

17. Ware signed the application on behalf of BTW. However, she did not personally prepare the application, she did not furnish any information that went into the applica-

tion; and she did not even verify any of the representations in the application even though the application identifies her as the individual under whose direction all non-engineering exhibits were prepared. At the time the application was filed, Ware had not met with any of the other directors, and she could not recall whether she had even spoken to any of them prior to signing the application. She thinks Wade put the application together. Bureau Ex. 1, p. 4; Tr. 954-965. Ware claims to have been told by Wade that she had a term of office. She thinks he told her that her term as a director would run two or three years. Tr. 952.

18. Campanella had reservations right from the start about accepting a position on BTW's board because none of the other directors had experience in broadcasting; there was no broad based representation of minorities on the board, such as Hispanics and Asians; and there was no mention about entities such as the NAACP. Nevertheless, Campanella agreed to serve on the board of directors, provided that within several months BTW would add to its board representatives from key community organizations. Tr. 1394-1399. Like Woodfork, Campanella did not specifically authorize Ware to file the application, despite a representation in the application to the contrary. Bureau Ex. 1, p. 14; Tr. 1408. Wade did not discuss with Campanella how long he would serve as a director. Tr. 1405.

19. Pate does not recall seeing the application before it was filed. Nor did she authorize anyone to file the application. Bureau Ex. 1, p. 14; Tr. 1137. At the time she accepted her appointment to BTW's board, Pate had no understanding as to what her duties would be or the duration of her term, if any, as a director. Tr. 1137, 1139.

20. Duncan did not believe that he had any specific term of office as a director. Tr. 1539. Wilson, on the other hand,

thinks Wade may have told him his term would last three or five years. Tr. 1623.

21. Wade filed an amendment to BTW's application on January 8, 1982. Bureau Ex. 4. The amendment was not signed by a principal of BTW. In addition to submitting BTW's Articles of Incorporation and notifying the FCC that Wilson had been added to BTW's board as the eighth director, the amendment represented that Cordell was BTW's President and would serve as General Manager when the station went on the air. The amendment also represented that Ware was BTW's Vice President and would serve as Director of Public Affairs when the station commenced operations. Bureau Ex. 4. p. 2.

22. Neither Woodfork, Campanella, Pate, nor Duncan ever voted for Cordell or Ware to become officers of BTW. Tr. 547-548, 1421-1423, 1144-1145, 1546-1549. Even Ware does not recall ever being elected BTW's Vice President or agreeing to be the station's Director of Public Affairs. Tr. 984-985. Ware could not recall Cordell ever being President. Tr. 986.

23. Although the initial slate of directors was apparently already in place at the time Wilson joined the board, the board did not elect Wilson to be a director. Tr. 543-545, 1142, 1143, 1442, 1548, 1627. Rather, Wade simply named Wilson to the board. Tr. 1614-1616. Wade also unilaterally designated Wilson to be BTW's Chairman. Tr. 1622-1623.

24. Wade designated Wilson as Chairman because of his extensive background in communications (Tr. 1616, 1618, 1627) /7 in order to counter BTW's opponent in the comparative hearing who had a communications professor from UCLA as its main participant. Tr. 1682-1683. In this regard, Wilson was the only BTW principal who testified at the comparative hearing for the Channel 68 construction

7/ Wilson was then Associate Professor at the USC school of Journalism and Director of the Media Institute for Minorities, funded by the Times-Mirror Company. Wilson is currently Associate Dean of the School of Communications and Interim Chairman of the Department of Journalism at Howard University. Tr. 1614, 1622.

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permit. Tr. 1624. At the time of designation, Wilson. requested and Wade gave him the names of the other directors. Wilson wanted to contact the directors to determine whether they wanted him to serve in that capacity and their interests coincided. Wade assured him it was unnecessary and there would be no problem since one of the directors was his sister and another director, Woodfork, was a close friend. Tr. 1618, 1681-1682. Further, Wade made clear that he was the organizer of BTW and his recommendation was tantamount to approval. Tr. 1681-1682. Wilson made no effort to contact the other directors and did not meet the other board members until April 1983, the meeting held after grant of the construction permit. Tr. 1683.

25. Wade also filed an amendment to BTW's application on September 27, 1982. Bureau Ex., 8. Among other things, the amendment reported a new mailing address for BTW, provided a new staffing proposal, and submitted a copy of an executed Internal Revenue Service "Application for Recognition of Exemption." The IRS application was dated September 24, 1982, and was signed by Ware. Bureau Ex. 8; Tr. 1003.

26. Neither Woodfork, Campanella, nor Pate was aware that an amendment had been filed on September 27, 1982, on behalf of BTW. Neither Woodfork nor Pate was ever asked to authorize the filing of the IRS application for a

tax exemption (Tr. 555-556, 1148, 1429), and Campanella had no knowledge of or input into BTW's revised staffing proposal, even though he had received assurance from Wade that he would be called upon to provide his expertise in this area. Tr. 1429. Although Ware signed both the amendment and the IRS application, she did not verify any of the information in those documents, nor did she understand what it meant to amend an FCC application. Tr. 1003-1004.

27. Wade's role ostensibly was to be limited to that of counsel to the corporation. There were signs, early on, however, that Wade envisioned a more significant role for himself and a different broadcast operation than contemplated by the directors. Wade told Campanella, for instance, that BTW's noncommercial station would work in tandem with Wade's commercial low power network by serving as a basis for a production company that Wade planned to organize. Tr. 1404. Indeed, within the first six months of becoming a board member, Campanella came to perceive Wade's intentions in the following manner:

> It seemed to me that, if you were to put together an organizational chart from the point of view of Booker Wade, that he would be at the top of the pyramid, and off to the right somewhere there would be a line that goes to the board of directors. Down the middle there would be a line that went to the production company that [Wade] was running. Off to the left there would be another line linking him with this low-power television network, and another line would be a box which would probably have a question mark in it, any other idea [Wade] might have that's good and can be plugged in. Tr. 1504-1505.

BTW's Post-Grant Activities

28. BTW's application was granted in April, 1983. Bureau Ex. 9, Shortly thereafter, a meeting of the Original Eight Directors was convened. Tr. 734-738. That meeting was attended by all of the Original Eight Directors and Wade. Tr. 733-739, 1446. It was largely a self-congratulatory and introductory meeting. Tr. 987, 1445-1446,1532-1533, 1629-1630. The directors did discuss the importance of fund-raising, although no official actions were taken. Tr. 539-542. Wade and Wilson ran the meeting. Id. No official documents, such as articles of incorporation or by-laws, were distributed. Id. No election of any officers was conducted, although Wade announced that Ware would serve as Secretary and Treasurer and that, in that role, she would have control of the books and the corporation's money. Tr. 548, 645.

29. Campanella was unaware that Ware was ever anything other than a director. Tr. 1441-1442. Wilson never voted for Ware to be Treasurer; he believed that Ware was Treasurer when he became a director Tr. 1662. Duncan acknowledged that at some point Ware assumed responsibility for taking care of BTW's checkbook, but he never voted for her to be Treasurer and did not know that she held that particular title. Tr. 1565-1566. Ware thinks that Wade offered him the position of Treasurer during a telephone conversation, but she could not recall when the conversation took place. Tr. 977-978. 1050-1051.

30. Following the grant, various BTW directors undertook projects designed to enable the corporation to construct and operate its station. Wade was at that time generally recognized by the directors as being BTW's general counsel or legal counsel. Tr. 556, 1408, 1620. /8 Since none of the directors had any experience or expertise with respect to the Commission's rules and regulations, they

8/ There is no evidence that any formal board action was taken to retain Wade as counsel for BTW. According to Woodfork, BTW never asked Wade to be its lawyer, "he came in to us." Tr. 689.

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looked to Wade for guidance and advice in that area. Tr. 1498, 1621, 1644, 1740. In other areas, however, various directors felt capable of advancing corporate interests. In each instance, however, their individual efforts were frustrated by the actions of Wade.

31. For example, Duncan, Wilson and Campanella all recognized that, for the board to be able to operate at all, it had to have a set of by-laws establishing both the parameters of the board's authority and the mechanics for exercising that authority. Tr. 1433, 1533, 1635. Since Duncan was a California attorney with experience in forming non-profit corporations, he volunteered to draft a set of by-laws. Tr. 1533. He did in fact draft such by-laws (approximately five-six pages in length), which he provided to Wade for his review and comment. Tr. 1534-1535, However, Wade never provided any comment, and Duncan's draft by-laws were ignored. Tr. 1535.

32. Similarly, Duncan sought to cultivate potential fund-raising sources through his contacts in Los Angeles. Tr. 1558. Again, however, his efforts were frustrated and/or discouraged by Wade, who declined to provide Duncan with information or assistance which Duncan believed to be necessary to his efforts. Tr. 1541. As a result, those efforts were non-productive. Tr. 1560-1561.

33. Campanella encountered similar problems. Recognizing the relative inexperience of the board members relative to broadcast matters, he proposed that Wade provide the board with a workshop or seminar covering all the key

decision-making points necessary in constructing a non-commercial television station. According to Campanella, Wade's response was "like, hey, why are you even bringing that up. Don't rock this boat." Tr. 1496. While Campanella urged that BTW seek funds from nationally-recognized organizations (such as the Ford Foundation or the Rockefeller Foundation), he found Wade determined to pursue negotiations with a Korean-owned company which was interested in purchasing blocks of program time, an arrangement about which Campanella had serious misgivings. Tr. 1444-1445, 1491-1492.

34. Early on as Chairman of BTW, Wilson had deferred to Wade because Wade was the organizer and a former FCC attorney. Wilson had no reasons to question Wade's motives. However, Wilson would later tell Woodfork that the more he attempted to exercise his independent authority as Chairman, the more difficulty he encountered with Wade. Tr. 756. In fact, Wilson came to believe that Wade was attempting to sabotage his efforts to advance the project. /9 Wilson based this belief, in part, on Wade's continued failure to produce by-laws, Wades frequent rejection of his ideas, and Wade role in orchestrating Wilson's removal from the board. Tr. 1655, 1740-1741,

35. Wilson cited a number of instances where Wade frustrated his efforts. He contacted an individual willing to lease BTW space for its transmitter on Mt. Wilson; Wade discouraged any follow-up with respect to that opportunity. Tr. 1632-1633. In connection with a search for potential

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9. Wilson testified that "...from the time the permit was awarded...until about a year after that, all of the efforts that I was trying to put forward...seemed to be frustrated by Mr. Wade." Tr. 1632.

studio sites, Wilson (together with Campanella) had identified an opportunity to locate BTW's studios at the Ebony Showcase Theater. That site, at the crest of a hill, was understood by Wilson to be superior because of engineering reasons, Tr. 1652. However, Wilson was discouraged by Wade from pursuing that site and Wilson's efforts with respect to that site were ultimately cited in a document prepared by Wade as a basis for dissatisfaction with his performance on behalf of BTW. Id., Tr. 1632-1633, 1796-1797,

36. In another situation, Wilson spent his own money to fly himself, an attorney and an engineer to Las Vegas, where the National Association of Broadcasters was having its annual convention, apparently in 1984. Tr. 1649. The purpose of the trip was to meet with potential sources of financing who might assist BTW in its construction and operation. Tr. 1649. Additionally, the engineer was brought along to review available equipment packages on display at the convention. Tr. 1650. Wilson advised Wade that he was making this trip, and Wade advised Wilson to take the trip. Tr. 1739. /10 However, in May, 1984, the making of the Las Vegas trip was cited as a reason for removing Wilson from his position as "chairman". Bureau Ex. 13; Tr. 1647.

37. The most consistent complaint about Wade voiced by BTW's directors in connection with the 1983-1984 period was his failure to provide them with any by-laws so that

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10/ In agreeing that Wilson should go to the convention, Wade indicated to Wilson that Wade himself could not attend the convention that year; however, when he arrived in Las Vegas, Wilson found Wade there although Wade offered no explanation as to why he had told Wilson that he would not be there. Tr. 1740.

they could organize themselves properly. As noted above Duncan perceived the need for by-laws very early on, and was frustrated at Wade's failure to provide any, or to cooperate in the creation of by-laws by Duncan. Tr. 1533-1534. The same frustration was expressed by Campanella, e.g., Tr. 1419, and Wilson, e.g. Tr. 1633-1634. In fact, Wilson's frustration became so great after several months that he sought independent counsel to assist in locating BTW's supposed by-laws so that the board could begin to function properly. Tr. 1633-1634. That independent counsel was Gregory Young (Young), Wilson's personal attorney. Tr. 1634. /11

38. By the end of 1983, there had been and continued to be significant pressure on Wade to produce by-laws for the corporation. He failed to do so, despite the fact that he repeatedly told individual members of the board that he, Wade, had even copies of the by-laws to other members of the board. /12 For example, Wade told Campanella and Woodfork that Wilson had been given copy of the by laws. Tr. 551, 1419. Wilson denies ever having been given or even having seen any by-laws. Tr. 1634. To the contrary, Wilson testified that Wade had told him that the by-laws were included in certain files which Wade had placed in storage. Tr. 1633-1634.

39. At the end of 1983 or early 1984, with Wilson pressing for a copy of the by-laws, Wade advised Wilson that, according to the by-laws which Wade supposedly possessed, the terms of Duncan, Page and Campanella had

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11/ Wilson testified that he did not believe it appropriate to ask Young to draft an entire new set of by-laws because Wade had repeatedly and expressly told Wilson that by-laws we're already in existence. Tr. 1640-1641.

expired; accordingly, Wilson was told by Wade to notify those three individuals that they were no longer on the board. Tr. 1635-1636. With Wade's concurrence, and solely on the basis of Wade's oral representations concerning the supposed content of the supposed by-laws. Wilson wrote to each of the three and advised them they were no longer on BTW's board. Tr. 1635-1636.

40. Pate was shocked to learn that her term as a director had expired because she did not know there were any

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12/ Only one witness claimed ever to have seen any by-laws prior to January, 1987. Ware, Wades sister. stated that Wade distributed by-laws to the board at a meeting in 1983, Tr. 989-990, and that she may have had a copy as early as 1981, when she signed the application. Tr. 994. Ware's testimony cannot be credited for several reasons. First, Ware's recollection was notably vague, and those details which she did claim torecall were inconsistent with the available documentary evidence. (i.e., she recalled the by-laws as being only "two or three pages". possibly with a fourth page. Tr. 990-991; but the document claimed by Wade to be the by-laws. Bureau Ex. 5, is 16 pages long.) Second, her testimony concerning supposed distribution of supposed by-laws was expressedly, and flatly, contradicted by the other Original Eight Directors who testified. Tr. 548, 978, 986, 1633. Third, her demeanor on the witness stand undermined her credibility -- claiming little or no recollection of obviously important matters, appearing confused, Ware cannot be deemed to have been a reliable witness. In any event, her incredible, meager claim that she (and other board members) may have ever been given by-laws cannot be accepted in the face of overwhelming, consistent, credible evidence to the contrary.

by-laws or terms of office. Tr. 1146. Nevertheless, because of personal obligations and her perception that BTW was a disorganized group, she made no effort to retain her seat on BTW's board. Tr. 1148. Duncan does not recall ever being informed by Wilson that his term had expired. Tr. 1540-1541. However, he does recall a time when he no longer received notices of board meetings, after which Duncan ceased to participate actively in the corporation. Tr. 1547, 1564. Campanella had mixed emotions about attempting to rejoin the board. He wanted to be part of the project, given the socially important role that he thought the station could play, but he felt the board was a mere fiction. Ultimately, Campanella decided to seek "reelection" to the board. Tr. 1540-1543.

41. A meeting of BTW's board was held on March 10, 1984. Wilson prepared the notice for the meeting which contained the agenda items. The items listed included the election to fill vacancies on the Board of Directors, discussion of a possible studio and apprising the board of negotiations with Asian Tigers Enterprises, Inc. Bureau Ex. 32. In this connection, Wilson stated that Wade had indicated to him that one way to obtain start-up funds was to enter into agreements with ethnic minority entities for the purchase of program time. Tr. 1689. Wilson advised Wade in advance of the meeting that he intended to nominate Young to a seat on the board. Wilson told Wade that it was not his desire to replace Wade as counsel; he simply wanted a local attorney who could assist BTW in its business affairs. Tr. 1671-1672. Wilson also apprised Wade of the fact that Campanella wanted to continue as a member of the board. He also told Wade that this was an opportunity for him to serve as director. Tr. 1694.

42. Wilson testified that Wade concurred in the calling

of, and planned to attend the March meeting. Tr. 1636 -1637. Also, Wade agreed reluctantly, to stand for election as a director. Tr. 1694. However, other testimony indicates that Wade was in fact extremely upset about the plans to hold that meeting. Woodfork testified that Wade called her numerous times immediately prior to that meeting, suggesting that "it was illegal for us to be meeting at Greg Young's office." Tr. 669, 563. Wade initially instructed Woodfork not to attend the meeting; later, he told her to attend so that she could tell him what transpired at the meeting. Tr. 564-566. He also told her not to vote on anything, but that any actions taken at the meeting would in any event be nullified. Tr. 561-566. According to Woodfork, Wade was "very, very. very nervous" the morning of the meeting. Tr. 668.

43. Woodfork, Ware, Wilson, Campanella, and Young attended the March 10, 1981, meeting. Tr. 562. Contrary to his earlier statements to Wilson, Wade did not attend. Tr. 1637. That meeting appears to have represented the culmination of a long dispute between Woodfork and Wilson. Woodfork did not know that Wade had personally named Wilson to be BTW's Chairman. In fact, Wade had emphatically denied to Woodfork that he had done so. Tr. 780. In her conversations with Wade, Wade repeatedly told her that' Wilson did not have the right to hold himself out as Chairman and Wade urged Woodfork to challenge Wilson's authority. Tr. 545. Woodfork asserts she learned for the first time at the March 10 meeting that there purportedly were terms of office for BTW's directors when Wilson announced at the meeting that he had removed Pate, Duncan, and Campanella from the board. Tr. 567. When she demanded of Wilson that he provide proof that he had any right to take such action, Wilson responded that although

he did not have any by-laws, he had acted pursuant to Wade's orders. Tr. 567. Woodfork believed at that time that Wilson had concocted the terms of office in a scheme to get rid of the three directors, and he was merely trying to blame it all on Wade. Tr. 656. At some point Campanella and Young joined the fray, accusing Wade of interfering in BTW's affairs. According to Woodfork, the meeting was very ugly. Tr. 567-568.

44. Wilson nominated Young and Campanella to the board. Wilson also nominated Wade to be a director. All three were subsequently elected. Tr. 566-569. /13 Ware abstained from the vote, even though her own brother was under consideration. Tr. 1637. /14 Woodfork testified that she believed, on the basis of her conversations with Wade before the meeting, that the vote was meaningless because it was "going to be voided anyway." Tr. 568.

45. Within two months of the March, 1984 meeting, a further meeting was convened on May 19, 1984. See Bureau Ex. 13. Attending the meeting were Ware, Woodfork, Payne and Wade (as well as Payne's employer, Arike Logan, since the meeting was held in Dr. Logan's offices. Tr. 5672). Bureau Ex. 13. Wilson was not notified of this meeting, Tr. 1648, 1646; instead, he was sent a telegram after the meeting advising him of actions taken at the meeting. Tr. 1646. Wade ran the May, 1984 meeting as legal counsel. Tr. 774-775. At the meeting, Wade emphasized the importance of taking minutes of the May, 1984 meeting in order to "document that [what had happened

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13/ Woodfork does not recall that Campanella was in fact reelected at that meeting. Tr. 569. But Wilson recalled that he was reelected. Tr. 1637. The minutes of the May, 1984 meeting Bureau Ex. 13) supported that recollection.

14/ Ware testified that she had actually voted against Wade in the March, 1984 meeting supposedly because "he never said he wanted to be on the board." Tr. 1017. But Woodfork and Wilson the only other two people at the meeting who testified both clearly recalled that Ware abstained from voting. Tr. 568, 1637. As discussed, supra, Wade had instructed Woodfork to attend the meeting but "not to vote", Tr. 566. the approach apparently taken by Ware. Ware claimed that Wade did not give her instructions as to how to vote. Tr. 1017. However, she offered no credible explanation for her refusal to vote for her own brother as a director. Ware's testimony relative to the March, 1984 meeting is but another illustration of the inherent incredibility of her testimony overall.

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before) was being voided." Tr. 572-573. Matters considered at the May, 1984 meeting including voiding the March, 1984 elction of Campanella, Young, and Wade, and removal of Wilson from his position as Chairman. Bureau 13.

46. Citing the importance of a clear record of the board's actions, Tr. 572-573, Wade stated that he would assist in the preparation of the minutes of the May, 1984 meeting. Tr. 573. Those minutes, prepared by Payne under Wade's direct supervision, are included in the record as Bureau Ex. 13, Tr. 572-573, 1028. /15 With respect to the reasons cited in the minutes for the voiding of the March, 1984 election (i.e., a supposed lack of adequate notice of that meeting), Wade was the one who raised that supposed lack of notice. Tr. 573. With respect to the reasons underlying the removal of Wilson, Wade said he would provide those reasons. Tr. 573. Among the reasons for Wilson's removal listed in the May, 1984 minutes was a supposed failure by Wilson to file BTW's by-laws with the California Secretary

15/ According to Ware, Payne preceded her as BTW's Secretary. Ware maintains that the directors agreed at an informal meeting to make her Secretary alter Payne resigned. However, Ware could not identify any of the board members at the informal meeting who agreed to make her Secretary, and she was unable to be any more specific about when she became Secretary other than that it occurred in the 1980's. Tr. 979-980. Additionally, Ware does not recall ever taking notes at any meeting, and she apparently never maintained any corporate books or papers. Tr. 984, 1052-1053.

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of State. Bureau Ex. 13. As noted above, however, Wilson had never seen or possessed any by-laws, despite having repeatedly asked Wade for a copy. Tr. 1623. Also, it appears that, under California law, by-laws are not required to be filed with the Secretary of State. Tr. 221, 812. /16 Another supposed reason, cited in the minutes, for "displeasure" with Wilson was the fact that Young had been listed as the addressee for BTW matters sent out by a bank at which BTW had certain accounts. Bureau Ex. 13.

47. Also reflected in the minutes of the May, 1984 meeting is the election of Ware to serve as "acting chairman for a period of one month" and the employment of one "Gwen May" as a "contract employee". Bureau Ex. 13. Gwen May is a cousin of Wade's. Tr. 776.

48. Despite the representations in the minutes of the May 19, 1984, meeting, Ware could not recall how she became Acting Chairman. At best, she thinks she was Acting Chairman in the "1990's," but only served for a short period of time. Tr. 999. 1028-1029. However, in a written statement submitted to the Commission in November 1987 as part of Wade's "Opposition to Informal Objection," Ware represented that she became Acting Chairman

16/ Other reasons cited in the May, 1984 minutes for displeasure with Wilson included his efforts to arrange a studio site and his trip to Las Vegas. With regard to the former, while the minutes refer to an "agreement" with a site owner with whom Wilson had discussed the matter. Wilson clearly testified that there was no "agreement" at all with that site owner, and that there was no basis for any "displeasure" by the board relative to his activities in connection with his discussions with the site owner. Tr. 1652. With regard to the Las Vegas trip, the minutes were contrary to the facts: the minutes referred to an "imprudent expenditure of funds", when in fact Wilson had spent his own money on the trip. Tr. 1654.

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after Wilson's "resignation" and has served in that capacity ever since. Bureau Ex. 30. p. 2. Ware could not recall where the information came from which formed the basis for her prepared statement. Tr. 1066-1068. She also could not recall Wilson's failure to file by-laws as being an important reason for removing him from office. Tr. 1080. Although the minutes of the May 19, 1984, meeting represented that BTW had amended its by-laws, BTW did not submit any amended by-laws to the Commission.

49. Also reflected in the minutes of the May, 1984 meeting is the voiding of the March, 1984 election of Young and Wade and the reelection of Campanella to the board. Bureau Ex. 13. In this connection, Woodfork testified that Wade had told her that he believed that, if he were on the board, BTW might be held to some greater level of "accountability" by the Commission. Tr. 578. According to Woodfork, Wade believed that:

> if he were on the board the FCC would look to the board for more accountability. ... [I]f he were not

on the board, they would just slap our hands. But if he were on the board, then there would be something about accountability, issues or questions raised about things. Tr. 578.

50. Despite the board action relieving him as Chairman, Wilson subsequently received a telegram advising that he had been removed from the board entirely. Wilson was surprised by the telegram, given the fact that he had never even been informed that there was going to be a meeting to discuss his ouster. Tr. 1647-1648.

51. After receiving the telegram, Wilson telephoned Ware. Ware was not responsive to any of the questions that he asked her, particularly how the May 19, 1984, meeting could have been held in his absence, and why, if there was dissatisfaction with his leadership, no questions whatsoever had been raised earlier. Ware merely informed Wilson that it was upon Wade's advice that the board voted to remove him. Tr. 1747-1750. Wilson also spoke with Wade. Wade was adamant that Wilson's removal was what needed to be done. Tr. 1666.

52. A further meeting of BTW's Board was held in September or early October 1984 attended by Wilson and Young. Both complained that Wilson's chairmanship had been taken away from him wrongly and that Wade was starting to control the corporation. Wilson still wanted Young on the Board but Woodfork and Ware, the other directors at the meeting, opposed holding another election. At that point, Wilson severed his ties with BTW because it was obvious to him that Ware and Woodfork were controlled by Wade and that without opening up the Board to other members, Wilson would be outvoted by Ware and Woodfork, Tr. 779, Woodfork does not deny she was controlled by Wade. She states she believed everything Wade

said and did everything he asked her to do. Tr. 779. She claims she was naive to believe that Wade, a lawyer, would not do anything to harm BTW. Also, she was influenced by Wade's FCC background, knowledge of communications law, and the fact he was a "trusted friend." Tr. 780. As reflected in the findings, below, Woodfork's trust in Wade and Wade's intentions viz a viz BTW did not erode until September 1986.

53. Thereafter, on October 9, 1984, Wilson, Young, and Campanella obtained an indemnification agreement from Wade, pursuant to which they agreed to leave BTW's board. Bureau Exs. 11, 12. Campanella was very happy when Wade signed the letter permitting his unqualified removal from BTW because he felt that if Wade were capable of lying to the board, then Wade could very well have been engaged in activities that might later entangle Campanella "if an offended party cast a wide-enough net." Tr. 1457. Indeed, Campanella (as well as BTW's other original directors), was later threatened with a lawsuit in connection with the proposed sale of BTW's station to Hispanic Christian Communications Network. People associated with the proposed sale called Campanella and disturbed his family on a daily basis. They told him he mightlose his home because the lawsuit would cost him so much. Campanella ultimately signed a release, although he has consistently maintained that he did so under duress. Tr, 1466-1469.

54. Campanella left the board after he came to believe that BTW was being compromised beyond the point of no return and that the ability of any board member to exercise his or her fiduciary responsibility was being jeopardized. Tr. 1425. Campanella viewed BTW as a unique opportunity for African-Americans to operate a public broadcast station

in a major market. Referring to Wade, Campanella testified that it struck him as misguided to toss away this rare and extraordinary opportunity because of one's quest for personal gain. Tr. 1484-1487.

55. Following the departure of Campanella, Wilson, Duncan, and Pate, the only active members of BTW's original board were Woodfork, Ware, and Payne. /17 The Commission was not informed that BTW's board, originally consisting of eight individuals, was now reduced by at least half that number.

56. After Wilson, Campanella, Duncan, and Pate were removed from the board, Wade personally became more active in BTW's affairs. Wade ran BTW's board meetings. He told the board what to do. The board members never formally consented to Wade presiding over their meetings, he just did it, and the board essentially acquiesced. Tr. 774-775. Wade also began holding himself out in a number of documents as an officer of BTW, notwithstanding the fact that he had not been elected an officer of BTW.

57. In January, 1985, Wade filed an application for "Federal Assistance with the National Telecommunications and Information Administration (NTIA). Wade identified himself in the application as Vice President of BTW. Bureau Ex. 14. Although BTW's board had authorized Wade to file the application, it had not authorized him to hold

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17/ Cordell did not actively participate in any BTW matters following the initial board meeting in the Spring of 1983. Tr. 938. Moreover, the extent to which Payne participated in BTW's affairs, if at all, beyond this point is unclear. Assuming, arguendo, that Wade's purported by-laws are valid, Payne's term would have ended in November of 1984. Bureau Ex. 5 p. 16.

himself out as an officer of the corporation. Tr. 580-583.

58. Ware maintains in a prepared statement that she "authorized" Wade to sign the NTIA and other forms and documents as Vice President and that Woodfork subsequently told her that she did likewise upon Wade's request. Bureau Ex. 30, p. 2. In contrast, Woodfork states that Wade was never given authorization to represent himself as being an officer. Tr. 676. In fact, Woodfork testified to having been involved in a spat with Wade on one occasion when she challenged him for having held himself out as an officer during a meeting with a prospective source of funding. Tr. 584-590). /18

59. On March 8, 1985, almost two years after BTW was granted a construction permit, Wade filed an Ownership Report (FCC form 323-E) with the Commission on behalf of BTW. Bureau Ex. 10, pp. 1-3. Woodfork signed the Ownership Report in blank at Wade's direction. Tr. 558, 937. Woodfork told Wade that she wanted to see the completed form, but Wade told her there was no time. Tr. 559. The Ownership Report represented that the information was current as of April 30, 1983, and it identified BTW's governing board as consisting of the eight directors to whom the construction permit had been granted. Although it listed Woodfork as a Vice President; Ware as a Vice President and Treasurer; Cordell as President; and Wilson as Chairman (Bureau Ex. 10, pp. 1, 3), BTW's board never elected any of these individuals to these positions. Tr. 937.

60. less than two weeks later, on March 18, 1985, BTW filed another Ownership Report. This Ownership Report

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18/ Woodfork's objection to Wade's holding himself out as an officer of BTW rests, at least in part, from her belief that only directors could be officers. Tr. 590, 594.

was signed by Wade, who identified himself as Vice President, and it contained information as of January 14, 1984. Wade represented in this second Ownership Report that BTW's board consisted of four persons: Woodfork, (no office); Ware, Treasurer and Secretary; Cordell, Vice President; and Wade, Vice President (but not a board member). The Ownership Report further stated that Wade had been elected a Vice President by BTW's board. Bureau Ex. 10, pp. 4-5. Woodfork denies ever having voted to elect any of these individuals to the positions indicated. Tr. 938.

61. On April 13, 1985, Wade signed a letter of intent, on behalf of BTW, with Radio Telecom & Technology, Inc. (RTT). Wade identified himself as Vice President of BTW. Bureau Ex. 15, p. 3. However, according to Woodfork, Wade had never been elected Vice President of the corporation. Tr. 603.

62. On May 24, 1985, BTW appears to have attempted to execute an amendment to its Articles of Incorporation. The amendment proposed to change BTW from a nonprofit "mutual benefit" corporation to a nonprofit "public benefit" corporation. It appears to have been signed by Wade, who identifies himself as Vice President, and by an individual by the name of Hope S. Smith, who identifies herself as BTW's Assistant Secretary. The amendment recites that the change in BTW's Articles of Incorporation had been duly approved by BTW's board. Bureau Ex. 6, p. 2. Woodfork denies ever voting to amend BTW's Articles of Incorporation or even being asked to vote to amend BTW's Articles of Incorporation. Tr. 553-554. Although the amendment was submitted to the California Secretary of State, /19 it was not filed with the Commission.

63. In documents filed with the California Secretary of State on behalf of BTW, Wade held himself out as the

19/ By letter, dated June 28, 1985, the California Secretary of State notified Wade that the proposed amendment had been rejected because it was not executed properly. Bureau Ex. 6, p. 1.

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corporation's Vice President. He also identified his sister as BTW's Chief Financial Officer, and Woodfork as BTW's Chief Executive Officer. Tr. 1065.

64. Ware signed a resolution by which Wade purportedly was elected Vice President on September 2, 1985, although Wade had already been holding himself out as such prior to that time. Bureau Ex. 16; Tr. 1025-1026. Ware executed the resolution because she claims BTW needed to give Wade the authority to sign papers. Ware does not know who prepared the resolution, and she cannot recall another instance in which she signed a resolution when someone became an officer of BTW. Tr. 1025-1026.

65. Arlene Stevens signed Woodfork's name to the resolution, purportedly on Woodfork's behalf. Stevens was Wade's girlfriend. She had no position with BTW. Tr. 585-586, 677, 1024-1027. However, Woodfork did not authorize anyone to sign her name to any resolution, and there was no election of Wade to the position of Vice President. According to Woodfork, the document is a total fabrication. Tr. 590-592.

66. On October 22. 1985, Wade directed a letter to a Reverend K. C. Chambers in which he offered Rev. Chambers "four seats on an eleven person Board of Directors of Workshop and thirty-five percent equity interest in the for-profit affiliate-subsidiary" in exchange for a minimum of $2.2 million. Bureau Ex. 17. Wade identified himself in the letter as BTW's General Manager. The letter bears the countersignatures of Woodfork and Ware under a line

reading "By Direction of the Board of Directors." Wade became BTW's General Manager by letting it be known that he wanted the position. According to Woodfork, Wade knew more than she or Ware, so Woodfork did not object to Wade holding himself out as General Manager. There was, however, no board action in the formal sense making him General Manager. Tr. 589-590, 767. /20

20/ Woodfork, however, objected to Wade identifying himself as an officer of BTW during a meeting with Rev. Chambers. Tr. 584-590. According to Woodfork, Wade told Chambers that he was president of BTW and that his girlfriend, Arlene Stevens, was vice president. Tr. 584-585. Woodfork relates that Stevens, who held no position with BTW, was always with Wade when he was conducting corporate affairs. Tr. 585. Woodfork further relates that in turning down Wade's offer, Chambers warned her that "these people are going to break your heart." Tr. 586. Woodfork ignored his warning about Wade's intentions. Tr. 642.

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67. Wade, on behalf of BTW, entered into an "Agreement to Purchase Air Time" on October 28, 1985, with United Studios Company. The agreement, which specified rates for the purchase of broadcast time on Channel 68, was signed by Wade. He identified himself in the agreement as Vice President. Bureau Ex. 35.

68. On November 19, 1985, a board meeting purportedly was held at which Woodfork and Ware elected Wade a director, Executive Vice President, and Manager, Bureau Ex. 18. However, Woodfork states that she never attended any such meeting, and everything in the minutes of that purported meeting /21 is a fabrication. Tr. 592-593. Ware initially testified that she thought Wade had been elected a

director, but she did not know when or by whom. Tr. 1031-1032. /22 Later, she said she recalled approving him to hold the referenced positions, albeit on an "informal basis." Tr. 1224.

21/ The minutes were filed by Wade in support of his November 23, 1987, "Opposition to Informal Objection."

22/ The purported minutes state that Cordell was absent from the November 19, 1985, meeting. However, the set of by-laws submitted by Wade, assuming arguendo that they are valid, indicate that Cordell's term had already expired. Bureau Ex. 5, p.16

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69. Although Wade supposedly became a director and Executive Vice President at a board meeting purportedly held on November 19, 1985 Wade filed a further Ownership Report on April 1, 1987, which indicated otherwise. The Ownership Report represents that as of November 18, 1985 - - before the meeting was even held - - Wade was already a director, Executive Vice President, and, additionally, BTW's Chief Executive Officer. Bureau Ex. 10, pp. 6-8. Moreover, although Ware purportedly was elected Acting Chairman for a period of only one month as a result of the May 19, 1985, meeting (Bureau Ex. 13), the Ownership Report represented that she was still Acting Chairman on November 18, 1985. Ware could not recall how she became Acting Chairman, reiterating that BTW did many things on an informal basis. Tr. 1066-1067. Nor could she explain how she remained Acting Chairman beyond the one-month period. Tr. 1070. Ware went so far as to suggest that she and Woodfork took turns at various times acting as Chairman. Tr. 1072.

70. On July 7, 1986, Wade issued a "Status Report and

Immediate Term Business Plan" for BTW. Bureau Ex. 19. The document represented that Wade was then a director of BTW and was expected to be named as the company's President. Bureau Ex. 19, p. 4. However, Woodfork never approved the document. Tr. 627-635.

71. On July 22, 1986, Wade submitted a Supplemental Local Economic Action Program Report (Supplemental LEAP Report) to the Community Development Department of the City of Los Angeles. He identified himself therein as a director of BTW. Ware could not explain how Wade came to be a director in July of 1986. Tr. 1071.

72. On July 25, 1986, there was filed with the California Secretary of State a Uniform Commercial Code "Financing Statement" between debtor BTW and a secured party by the name of Harold Rick (Rick). Wade signed the Financing Statement on behalf of BTW. Bureau Ex. 20. Woodfork, recalls that Rick wanted to buy air time on BTW's station and that he loaned BTW at least $231,000. Tr. 604-607. The Financing Statement covered the following "property":

> All assets, tangible and intangible, including permits, licensees and authorizations issued by the Federal Communications Commission, except as follows: broadcast transmission and studio equipment and all assets hereafter acquired. Bureau Ex. 20.

Ware does not recall ever seeing the Financial Statement. Tr. 1035. Nor does she recall any discussion among the board members about giving as collateral any of the "assets" listed in the Financial Statement. Tr. 1038. Neither the UCC filing nor any other documents relating to Harold Rick's possible future interest in BTW was filed with the Commission.

73. On August 25, 1986, Wade, on behalf of BTW, filed with the Commission an Application for Extension of Con-

struction Permit (FCC Form 701). Bureau Ex. 22. Wade signed the application as Vice President, although he did not, according to Woodfork, hold any such position. Bureau Ex. 22, p. 2; Tr. 650. /23 Although the application represents that the exhibit affixed thereto was prepared by or under Woodfork's direction, Woodfork never saw the application at the time if was filed; she never prepared any part of the application; no part was prepared under her direction; and she never authorized anyone to use her name in the application. Bureau Ex. 22, p. 2; Tr. 647-658. Additionally, Woodfork states that she and Ware were the only directors of BTW at the time, and she never authorized Wade to file the application. Tr. 651-652.

74. In August 1986, Woodfork and Wade had a good working relationship, although there was evidence of a conflict between them taking root. Woodfork desired to participate in BTW's affairs to the fullest extent. The more she insisted on participating, the less Wade allowed her to do so. Wade informed her about BTW's affairs on what he called a "need-to-know" basis. Tr. 649-650.

23/ Ware testified that Wade was approved as a director and Executive Vice President at the November 19, 1985, board meeting because he said he needed those titles in order to file BTW's extension request. However, Wade did not identify himself in the extension request as a director, a fact which, when pointed out to her, Ware found surprising. Tr. 1225-1226. Ware also was unable to explain why Wade represented himself as Vice President in the extension request if he purportedly held the title of Executive Vice President. When pressed by the Presiding Judge as to whether Wade was indeed Vice President, Ware responded, "Well, what can I say, sir." Tr. 1226.

75. During the latter part of 1985 and continuing into 1986, BTW operated out of an office in the Los Angeles area. Tr. 1202. During this period, Ware recalls writing checks to Wade for his rent and "stuff like that." Ware claims that she and Woodfork agreed to pay Wade for his basic needs. Tr. 1208-1210. However, Woodfork maintains that BTW's board never even talked about paying Wade any money for his legal services. Tr. 689. Campanella, too, had no understanding during the time he was on the board that Wade would be paid for his services. Tr. 1412-1413. Wilson says he discussed the subject of money with Wade early on. However, it was agreed that all renumeration would be deferred until the station was operational. According to Wilson, the subject of paying Wade was never put to the board for a vote for the simple reason that the corporation had no money. Tr. 1645-1646.

76. The payment of money to Wade was done on a relatively informal basis. Wade basically told Ware how much money he needed without so much as submitting any bills or itemizing the expenses for which he was seeking reimbursement. Ware just accepted what Wade told her and issued him checks from BTW's account. Tr. 1231-1232. According to Woodfork, Wade and his girlfriend were using BTW's checkbook "like it was their own personal account." Tr. 661.

77. Among the checks that Wade received was one in the amount of $1,750, for his move to Los Angeles from Reno, Nevada. Tr. 1208-1209, 1213. That particular check was signed only by Ware, even though all BTW checks required the signatures of two authorized persons. Bureau Ex. 21; Tr. 983, 1215. On April 22, 1986. Wade received another check from BTW for $1,800 for legal services. Although this check indeed bore two signatures, Wade provided one

of them, and his girlfriend, Stevens, who signed Ware's name, provided the other. Ware testified that the $1,800 check "seemed" like one of the checks she authorized Stevens to sign, but she did not know why the money had been paid to Wade. Tr. 1217. Ware did not inform Woodfork about these disbursements from BTW's account either because there wasn't time or Woodfork was not available. Tr. 1217-1218. Many other checks were issued without Woodfork's knowledge or consent. Tr. 682-688.

78. Wade's girlfriend, Stevens, also signed other so-called "routine disbursements" for BTW without the board's authority. Tr. 1047. For example, Stevens signed Ware's name to checks for a particular project that Ware knew little or nothing about. The checks were made payable to a transcription company in connection with an FCC proceeding in which Stevens was involved. It was Ware's understanding that the checks represented money that BTW owed to Stevens. Tr. 1121-1122.

79. In September 1986, Woodfork went to the BTW office when no one was present and discovered documents which, upon review, she found shocking. /24 Among them was the resolution of September 2, 1985, Bureau Ex. 16, containing her unauthorized signature. Woodfork also discovered the referenced BTW checks for questionable disbursements and information about the financial arrangement with Harold Rick. She also obtained a docu-

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24/ Woodfork sought to enter the BTW offices to pick up a brochure she could use in her on-going efforts to raise funds for BTW. Tr. 536-537. As a director of BTW, she hid been given a key by Wade but was under the impression the key did not work. Tr. 536, 868-870, 702. However, to her surprise, the key did, in fact, work. Tr. 536, 704.

ment in Wade's handwriting depicting terms of office of BTW's original eight directors and describing three "options" for the election of individuals to various positions within the corporation. Bureau Ex. 28; Tr. 1354-13 According to Woodfork, it was a rude awakening that something was very seriously wrong with BTW. Tr. 658-660.

80. Woodfork questioned Wade to no avail about what she had learned, and she prevailed upon several attorneys in a bid to have them help her "straighten out" the situation. Tr. 661. Wade prevented anyone whom Woodfork brought to the office from examining BTW's books. Wade also told people that Woodfork was a trouble-maker and deranged. Tr. 670-671.

81. Ultimately, Woodfork retained an attorney who directed a letter to Wade suggesting that he, Woodfork, and Wade meet to discuss BTW's state of affairs. The meeting never took place and shortly, thereafter, Wade informed Woodfork, by letter dated December 18, 1986, that her term of office had expired. Wade signed the letter as BTW's Vice President. Bureau Ex. 24, p. 2; Tr. 672.

82. On January 15, 1987, Woodfork arranged a meeting of BTW's board and the creditors of which she was aware. Her intention was to confront Wade about the representations he had made about being a director and a Vice President. Wade initially admitted to those assembled at the meeting that he had never been elected as a director. Later, however, he insisted that he was indeed a director and that his sister had put him on the board after everyone else's term had expired. Wade also tried to explain that he had been authorized to hold himself out as an officer of the corporation, but Woodfork denied that any such authorization had ever been given. Tr. 673-676.

83. Wade subsequently attempted to resolve his dispute with Woodfork by offering her any position with BTW that she wanted, except a seat on BTW's board of directors. The proposed settlement package also included the payment of money to Woodfork as well as stock in an undisclosed company. Tr. 730, 733. Woodfork rejected Wade's overtures. Tr. 732.

84. On or about February 25, 1987, BTW's television station commenced operation. On that date, Wade filed the captioned application for license to cover BTW's construction permit. Wade signed the application as Vice President.

85. On June 9, 1987, Wade and Ware executed an amendment to BTW's Articles of Incorporation. Wade and Ware signed the amendment, identifying themselves as Vice President and Secretary, respectively. The amendment changed BTW from a nonprofit "mutual benefit" corporation to a nonprofit "public benefit" corporation. Bureau Ex. 7. Although the amendment appears on its face to have been filed with the California Secretary of State, BTW did not file the amendment with the Commission.

86. Although BTW's Articles of Incorporation, which were filed with the Commission in January 1982, state that BTW was originally a nonprofit "mutual benefit" corporation (Bureau Ex. 2, p. 2), Wade's by-laws, which purportedly were also in existence at that time but were not filed with the Commission, /25 represent otherwise. The by-laws

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25/ The by-laws were first submitted to the Commission by Wade in support of his "Opposition to Informal Objection," November 23, 1987. The by-laws are unsigned and undated, Wade represented therein that the by-laws were drafted and executed on or about the time he filed BTW's full-power application for Channel 68 in Los Angeles.

represent that BTW was already a nonprofit "public benefit" corporation. Bureau Ex. 5.

87. Moreover, the by-laws submitted by Wade represent that, in the event the corporation owns or holds any property upon its dissolution and winding up, after paying or adequately providing for its debts and obligations, the directors shall dispose of the remaining property "in accordance with the articles of incorporation." Bureau Ex. 5, p. 8. However, BTW's Article of Incorporation, which were in existence in January 1982, make absolutely no reference to any procedures to be followed upon dissolution or winding up. Bureau Ex. 2, p.2. The more recent amendment to BTW's Articles of Incorporation does make such a reference. Bureau Ex. 7, p. 3. The record, therefore, provides compelling evidence, which has not been rebutted, that the purported by-laws were prepared by Wade in June 1987 concurrent with the amendment to BTW's Articles of In corporation.

88. On August 8, 1987, the Commission ordered the station off the air because of unauthorized construction.

CONCLUSIONS OF LAW

Issue (a). Unauthorized Transfer or Exercise of Control/Assignment of License

89. The first designated issue is directed to the question of whether control of BTW was transferred without Commission authorization or otherwise exercised by unauthorized persons in violation of Section 310(d) of the Communications Act. It states in pertinent part:

> No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to

any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.

90. Traditionally, the Commission has looked beyond legal title in determining whether a transfer of control has occurred. Rather, control has been defined as embracing any act vesting in a new entity or individual the right to determine the basic policies concerning the operation of the station. See Southwest Texas Public Broadcasting Council, 85 FCC 2d 713, 715 (1981), citing, WHDH, Inc., 17 FCC 2d 856 (1969), aff'd, 20 RR 2d 205, (D.C. Cir. 1970). It has been held that Section 310(d) of the Communications Act of 1934, as amended, contemplates every form of control, actual or legal, direct, indirect, negative or affirmative, over basic operating policies. Southwest Texas, supra, citing, Lorain Journal Company v. FCC, 351 F.2d 824 (D.C. Cir. 1965).

91. Legal control of a nonprofit, nonmembership corporation, such as BTW, lies in its directors. A legal or de jure transfer of control may occur when a structural change, such as an amendment to the corporation's by-laws, affects how the corporation's governing board is chosen. See e.g., Pacifica Foundation, 1 RR 2d 747 (1964) (structural change affected by revision of nonprofit corporation's by-laws constitutes a transfer of legal control even though composition of the governing board was not altered.). A legal or de jure transfer of control also may occur when there are significant changes in the com posttion of the board of directors. See e.g., Pacifica Foundation 41 FCC 2d 71 (Rev. Bd. 1973) (net effect of gradual changes in composition of corporation's board constitutes transfer of control.). A de facto transfer of control, on the

other hand, may occur when those named to the corporation's governing board do not or cannot exercise the control with which they have been charged. Southwest Texas.

92. The method of analysis for determining whether a de facto transfer of control has taken place is similar to that applied to traditional stock corporations. Generally, the Commission will examine evidence as to who is exercising control of policies regarding finances, personnel matters, and programming, Southwest Texas, supra.

93. In the instant case, the only persons who were ever authorized by the Commission to exercise control of BTW were the original eight directors listed in BTW's application. They are: Mary Woodfork, Clint Wilson, Gary Cordell, Roy Campanella, Jr., Linda Pate, Titilola Payne Parker, Jerrome Duncan, and Rosa Ware. The record establishes, however, that Booker Wade controlled BTW both before and after BTW received its construction permit.

94. BTW applied for authorization to construct a noncommercial educational television on Channel 68 in Los Angeles more than a decade ago. The purpose, at least according to the original principals, was to place on the air the nation's second-only (behind Howard University's WHMM(TV), Washington, D.C.) minority owned and operated television facility. The station was to have provided a unique service to the vast minority population in the greater Los Angeles Area.

95. Wade, however, did not share the dream envisioned by members of BTW's original board, Wade had his self interest in mind. Wade planned to establish a for-profit production company which would sell programming to BTW's station as well as the other stations in his low-power television network. To this end, Wade initially put together an application in the name of BTW for Channel 68 in Los

Angeles as an LPTV station. Wades game plan was briefly frustrated when a mutually exclusive application for a full-power station was filed for Channel 68. Wade then decided that he, too, would file a full-power application.

96. The record leaves no doubt that Wade was completely and exclusively in control of the application process. Wade prepared the application, making all the decisions concerning its contents. Most importantly, Wade handpicked the eight directors. Also, Wade named BTW's officers. None of the other directors participated in these decisions or, for that matter, were even consulted. The only involvement of a director in the application process was Wade's sister, Ware, who signed the application on behalf of BTW. However, Ware did not assist in preparing the application, she did not furnish any information, and she did not even verify any of the representations in the application.

97. The record also reveals that Wade was solely responsible for prosecuting the application through hearing. Incredibly, with the exception of Wilson, the directors played no role in the prosecution of BTW's application and appear to be unaware that BTW was involved in a comparative hearing. Wilson wan the only BTW principal who testified at the comparative hearing for the Channel 68 construction permit. Notwithstanding that the seven directors designated in the application were in place, Wade, without seeking the approval of or even consulting the directors, unilaterally named Wilson to the Board and designated him as Chairman. Wade made clear to Wilson that as the organizer of BTW he made the decisions and that it was not necessary for Wilson to contact the other directors to determine whether they wanted him to serve as Chairman. Thus, Wades conduct during the preparation

and prosecution stages makes readily apparent that the non-profit corporation denoted in BTW's application was merely an elaborate facade constructed by Wade to accomplish his goal of getting the Channel 68 grant. It also makes clear that Wade intended from the outset that he, not BTW's directors, would control the affairs of the corporation. Examination of the findings relating to BTW's post-grant activities buttresses this conclusion.

98. Following grant of the construction permit in April 1983, Wade's gameplan to assure continuing control of BTW was to withhold BTW's by-laws from its directors. Wade's gambit served a two-fold purpose. Without by-laws. the Board was unable to organize itself properly. Indeed, Campanella, Wilson, and Pate testified to feeling hampered. frustrated, and powerless by their inability to carry out their duties. Without knowing the nature or extent of its operating parameters, the board functioned like a ship at sea without a rudder.

99. Also, by withholding the by-laws, Wade unilaterally determined who would remain on the board. Thus, whenever it was necessary or convenient to remove a director, Wade (though not a director himself) could do so by announcing the expiration of the subject director's term. In that way, Wade eliminated the directors who posed the greatest threat to his authority and plans and assured a friendly and cooperative board.

100.The first directors whom Wade ordered off the board, purportedly on the basis that their terms had expired, were the two lawyers, Pate and Duncan, and Campanella. Campanella, whose testimony without question was articulate, compelling, and entirely credible, had the most media experience of all the original directors and, thus, was in a position to challenge Wade's business and

staff plans. Campanella was the most outspoken critic of the manner in which Wade intended to link his for-profit low-power television network and planned production company with BTW's noncommercial station.

101. There is no doubt that Wade orchestrated Wilson's elimination from the board, as well. Wade instigated the turmoil that developed between Wilson and Woodfork by directing Woodfork to challenge Wilson at every step of the way. There is every reason to believe that Wade also fomented further internal strife through his sister, Rosa Ware. In this regard, Ware was nothing more than Wade's pawn. With Ware as BTW's Treasurer a critical position to which Wade unilaterally named her -- Wade had unrestricted and unchallenged access to the company's funds of which he and his girlfriend, Arlene Stevens, later made personal use.

102. When Wilson attempted to exercise his independent authority as Chairman, his fate with BTW was sealed. Wade was briefly outmaneuvered by Wilson when, at a meeting on March 10, 1984, Wade and an attorney, Greg Young, were elected to fill the seats formerly held by Pate and Duncan, and Campanella was re-elected. However. with the help of his sister, and Woodfork, who admits she was then under Wade's control and did everything he asked her to do, Wade succeeded in quelling the shortlived rebellion.

103. At a board meeting on May 19, 1984 run by Wade, Ware and Woodfork, on the basis of trumped up charges against Wilson and Wade's spurious claim that adequate notice had not been given for the March 1984 meeting, voided the election of Campanella, Young, and Wade and removed Wilson as Chairman. In this connection. Wade did not want to be a director because of his belief that

BTW would have been held to a higher level of accountability in its dealings before the FCC with the presence of a former Commission attorney on the board. Furthermore, Wade could control BTW's directors just as easily from the sidelines by dictating the actions of Woodfork and Ware.

104. The record reflects that Wilson and Young made one final attempt to wrest control of BTW from Wade. This attempt was unsuccessful when, at a fall 1984 meeting, Woodfork and Ware opposed holding another election. At that point, Wilson, Young and Campanella severed their remaining ties with BTW. With only Woodfork and Ware on the board, Wade's dominance of BTW's affairs became even more manifest. Wade thereafter ran the board meetings and the directors served at Wade's pleasure, rather than vice versa.'

105. Woodfork, too, was eliminated from the board when she posed a threat to him. Woodfork's enlightenment came as the result of her visit to the BTW office over labor Day weekend, 1986, and her discovery of documentary evidence of Wade's improper activities. Woodfork thereafter alerted creditors to Wade's questionable practices and sought the assistance of outside counsel. Wade removed this latest threat to his gameplan by informing Woodfork that her term of office had expired. Thus, of the original eight directors, only Ware, Wade's sister and trusted pawn, remained. Following Woodfork's compelled departure from BTW. Wade perfected his absolute, iron-clad control over the permittee corporation.

106. Wade's de facto control of BTW is further evidenced by the manner in which he held himself out to the public and the Commission. As early as January 1985, Wade identified himself as a Vice President in an NTIA application that he prepared and filed on behalf of BTW. Wade

also held himself out as a Vice President in a letter of intent that he signed on behalf of BTW on April 13, 1985, with Radio Telecom & Technology, Inc. Wade prepared and presumably furnished all of the information contained in BTW's three Ownership Reports, and he signed two of them on behalf of BTW. On May 24, 1985, Wade attempted to amend BTW's Articles of Incorporation on behalf of BTW, and he identified himself in the amendment as a Vice President of the corporation. In a letter, dated October 22, 1985, Wade proposed to sell seats on BTW's board of directors in exchange for money. He also executed an Agreement to Purchase Air Time for BTW's noncommercial station on October 28, 1985. Wade identified himself as a director of BTW in a report submitted to the Community Development Department of the City of Los Angeles on July 24, 1986. On July 25, 1986, Wade filed a UCC Financing Statement with the California Secretary of State in which he pledged as collateral to Harold Rick BTW's construction permit and other FCC authorizations in exchange for money. Wade also filed an application with the Commission for an extension of construction permit, identifying himself therein as a Vice President of BTW. Wade also had unrestricted access to BTW's funds and drew money from BTW's checkbook at his discretion.

107. Based on the foregoing, control of BTW indeed was exercised by Wade, an unauthorized person, without Commission authorization, in flagrant violation of Section 310(d) of the Communications Act of 1934, as amended. As shown above, Wade exercised unilateral control from the outset over BTW's affairs and never relinquished that control. The extent to which Wade controlled BTW's affairs is evidenced by his unilateral actions removing directors from the board, naming persons to be officers of the

corporation, entering into agreements and filing applications, and by his control and unrestricted use of the company's finances.

108. Wade's scheme to seize control of BTW succeeded because the eight directors named to the governing board abdicated its responsibility to control BTW. The board members' passivity, both during the prosecution phase and after the construction permit was granted, made possible Wade's takeover of BTW. They, therefore, bear heavy responsibility for the violation of Section 310(d) of the Act. Wade was BTW's attorney. His role was to advise the Board, not make BTW's decisions. The only persons authorized by the Commission to exercise control of BTW were the eight individuals to whom the construction permit was granted in April 1983. Instead of serving at the pleasure of the Board, the Board members served at the pleasure of Wade. The Board had ample opportunity to assert its authority over Wade. When Wade failed to produce by-laws despite repeated requests to do so, the Board could have and should have fired Wade as its attorney. In this regard, Young, a local attorney, was willing and able to assist BTW in its business affairs. The Board did not fire Wade, nor did it adopt its own by-laws. Moreover, board members repeatedly failed to challenge Wade's assertions that their terms of office had expired; instead, they walked away from the corporation. Other directors resigned, albeit under protest. In the final analysis, Wade assumption of control was a combination of Wade's malfeasance and the Board's failure to exercise the control with which they had been charged.

Issue (b) - Misrepresentation/Lack of Candor

109. It is well established that an intent to deceive is the sine quo non of a misrepresentation issue. Armando Garcia,

3 FCC Rcd 1065, 1067 (Rev. Bd. 1988), rev. denied, 3 FCC Rcd 4767 (1988). While misrepresentations involve false statements of fact made with an intent to deceive, lack of candor involves concealment, evasion and other failure to be fully forthcoming. Both represent deceit, differing only in form. Fox River Broadcasting, Inc.. 93 FCC 2d 127, 129 (1983). Absolute candor is perhaps the foremost prerequisite for FCC licenseeship. Catoctin Broadcasting Corp. of New York, 2 FCC Rcd 2126 (Rev. Bd. 1987), aff'd in pertinent part, 4 FCC Rcd 2553 (1989), recon. denied, 4 FCC Rcd 6312 (1989); Mid Ohio Communications, 104 FCC2d 572 (Rev. Bd. 1986), rev. denied, 5 FCC Rcd 940 (1990);recon. dismissed in part, denied in part, 5 FCC Rcd 4596 (1990).

110. The record is replete with instances in which misrepresentations were made and/or a lack of candor was displayed to the Commission. Foremost are the misrepresentations reflected in the November 1981 application for the construction permit. Wade was depicted in the application solely as counsel to BTW. Thus, the impression was created that Wade's role was limited to an advisory capacity and that the governing board named in the application, and whom the Commission regarded as the principals of BTW, was and would be in control. In reality, the record makes clear, Wade was the real party in interest and the governing board was merely a cover to disguise Wade's pursuit of his personal ambitions. To sustain the aura of legitimacy, the application affirmatively represented that Ware, Campanella, Woodfork, Payne and Pate, a majority of the then seven directors, authorized Ware to file the application. Bureau Ex. 1, p. 14. However, Campanella, Woodfork and Pate deny having given such authorization. In fact, Ware concedes that she never spoke to any of the

other directors before the construction permit was granted to BTW in 1983. The application also identifies Rosa Ware as the individual under whose direction all non-engineering exhibits were prepared. Bureau Ex. 1, p. 4. However, the evidence reveals that Ware did nothing more than sign the application and return it to Wade. Simply put, the non-engineering parts of the application were prepared solely by Wade without the knowledge or approval of the directors, a fact concealed from the Commission.

111. Subsequent to the filing of the application, Wade made numerous misstatement in documents filed with the Commission in order to perpetuate the myth that the corporation was functioning as representated with the governing board in charge. In the unsigned amendment to BTW's application filed January 8, 1982, Wade represented that Cordell was BTW's President and would be its General Manager when the station became operational and that Ware was BTW's Vice President and would be the station's Director of Public Affairs. The record evidence reveals that the directors never elected Cordell or Ware to these offices and never agreed to their holding the assigned management positions when the station went on the air.

112. Similarly, the Ownership Reports submitted by Wade also contain significant misrepresentations. BTW's first Ownership Report was filed on March 8, 1985, and contained information as of April 30, 1983. The Ownership Report represented that Woodfork was a BTW Vice President; Ware was a Vice President and BTW's Treasurer; Cordell was BTW's President; and Wilson was BTW's Chairman. However, the record reveals that none of these persons was elected by BTW's board of directors to any of these positions. Although Woodfork certified to the truthfulness of the representations in BTW's first Ownership

Report, she signed the form in blank at Wade's specific directions. Thus, Woodfork cannot be completely absolved of indirectly participating in a fraud upon the Commission. Wade, on the other hand, ultimately must be held accountable for the misrepresentations made to the Commission in BTW's first Ownership Report, since Wade alone deliberately filed the Ownership Report containing information which he knew to be false.

113. BTW filed a second Ownership Report on March 18, 1985, less than two weeks after the first Ownership Report. It contained information as of January 14, 1985. Wade, who signed the second Ownership Report, identified himself as Vice President even though the record overwhelmingly reflects that he never held that position. Indeed, the only document that could even arguably suggest that Wade was elected to be an officer of BTW is a corporate resolution dated September 2, 1986. The resolution was executed by Wade's sister and girlfriend. The latter, Arlene Stevens, who never was a director, signed Woodfork's name to the resolution without Woodfork's authorization. The only conclusion that could possible be drawn is that the resolution is a complete fabrication.

114. Wade also signed BTW's third Ownership Report which was filed on April 1, 1987, and contained information as of November 18, 1985. Wade signed the third Ownership Report as Vice President, even though the Ownership Report states that Wade held the positions of director, Executive Vice President, and CEO. Thus, setting aside the fact that the Ownership Report is internally inconsistent, the record evidence is uncontroverted that Wade was never elected to any of these positions, and the representations therein were obviously false. The only evidence that could arguably even suggest that Wade was ever

elected a director or Executive Vice President are the minutes of a purported BTW board meeting held on November 19, 1985 -- after the effective date of the third Ownership Report. Moreover, although Woodwork and Ware are identified in the minutes as the only two directors who attended the November 19, 1985, meeting, Woodfork categorically denies ever participating in any meeting in which Wade was approved as an officer or director of the corporation, and Ware could only recall Wade being named a director, if at all, on an "informal basis." Consequently, it is concluded that the November 19, 1985, meeting never took place, the minutes of that meeting are bogus, and Wade was not elected a director or Executive Vice President.

115. Wade also committed a further misrepresentation in his request, filed on August 25, 1986, for an extension of time to complete construction of BTW's station. Wade identified himself in the FCC Form 701 as BTW's Vice President. However, Woodfork denies that Wade ever was elected to the position of Vice President, and his representation as such is, as discussed above, inconsistent with the minutes of the November 19, 1985, meeting at which Wade was supposed to have been elected a director and Executive Vice President. Moreover, although the extension request represents that the exhibit affixed thereto was prepared by or under the direction of Mary Woodfork, Woodfork flatly denies ever seeing the application, ever preparing any part of the application, ever having any portion prepared under her direction, ever authorizing her name to be used in the application, or ever approving the filing of the application.

116. It is also clear that Wade did not execute by-laws for BTW in 1981, as he falsely represented to the Commission

in his "Opposition to Informal Objection." The overwhelming evidence establishes that the by-laws (Bureau Ex. 5) came into existence sometime in 1987. As reflected in the findings, with the exception of Wade's sister, whose testimony lacks credibility (see note 12), none of the original directors who testified in this proceeding ever saw by-laws for BTW during their tenures on the board. Also, as reflected in findings 86 and 87, the inconsistencies reflected in pertinent documents compels the conclusion that the purported by-laws were prepared by Wade concurrent with and in contemplation of the June 1987 amendment to BTW's Articles of Incorporation.

117. Finally, Wade's claim that he currently is a director of BTW has no basis in fact. The evidence amply supports the conclusion that Wade was never elected to a seat on BTW's board, and his participation in the affairs and control of the corporate permittee has always been and remains without authority.

118. In sum, it is abundantly clear that Wade made numerous misrepresentations in filings with the Commission in order to hide the fact that he, rather than the directors, were in control of BTW. Wade deliberately misled the Commission by misrepresentations in BTW's application and amendments thereto; he intentionally held himself out as holding positions to which he had never been legitimately elected; he deceived the agency in claiming that the by-laws existed in 1981 when the evidence overwhelmingly proves otherwise; and the Ownership Reports that he submitted on behalf of BTW grossly distorted the true composition of the permittee corporation.

Issue (c) Section 73.3613(b) Violations

119. Section 73.3613 of the Commission's Rules states, in pertinent part, that each licensee or permittee of a non-

commercial TV station shall file with the Commission copies of the following contracts, instruments, and documents, together with amendments, supplements, and cancellations within 30 days of execution thereof:

(b) Ownership or control: Contracts, instruments or documents relating to the present or future ownership or control of the licensee or permittee or of the licensee's or permittee's stock, rights or interests therein, or relating to changes in such ownership or control shall include but are not limited to the following:

(1) Articles of partnership, association, and incorporation and changes in such instruments;

(2) Bylaws, and any instruments effecting changes in such bylaws;

120. The record reflects that BTW failed to timely file its organizational documents and amendments thereto with the Commission. BTW did not timely file its Articles of Incorporation or its June 1987 amendment to the Articles. Also Wade was required but failed to file documents relating to Harold Rick's possible future interest in BTW's FCC authorization. Accordingly, it must be concluded that BTW repeatedly violated Section 73.3613(b) of the Rules which requires such documents to he filed with the Commission within 30 days of their execution.

ULTIMATE CONCLUSIONS

121. The ultimate issues (Issues (d) and (e)) calls for a determination whether any of the persons or groups named in the preceding evidentiary issues possess the requisite qualifications to be or remain a permittee of the captioned television station. The record requires the determination that none of the persons or groups possess such qualifica-

tions. The record also compels the conclusion that the construction permit must be revoked.

122. More than a decade ago, BTW applied for authorization to construction of a noncommercial educational station on Channel 68, Los Angeles. Its ostensible purpose was to place on the air a minority owned and operated television facility which would serve the interests of the minority communities in Los Angeles area, primarily the African-American community. Booker Wade, who conceived of the idea to file the application for Channel 68, had a different vision in mind. His purpose in filing, unbeknown to the directors he had selected, was to establish a for-profit production company which would sell programming to BTW's station as well as the other stations in his planned low-power television network.

123. As reflected in the record, notwithstanding that BTW's application stated that control would be exercised by its directors, Wade intended from the outset to keep the reins of control in his hands. Once the first hurdle had been overcome with the grant of the construction permit, Wade systematically eliminated the persons who were authorized by the Commission to exercise control of BTW until only Ware, his sister, remained.

124. It is manifestly clear that, with the exception of Ware, the individuals who claim now to control BTW -- Booker Wade, Gwendolyn May. and Hope Smith -- have never had their qualifications passed upon by the Commission and are now holding themselves out as directors without any legitimate authority. It is also indisputable that the only persons who ever had any right to control the affairs of BTW are the original eight members of BTW's board of directors. It is they who constitute BTW; not Wade nor any of the individuals whom he may have named to replace the

legally constituted board.

125. The record reflects that control has been exercised by Wade, a person not authorized to do so, in violation of Section 310(d) of the Act. Also, numerous misrepresentations have been made to the Commission and the provisions of Section 73.3613(b) have been violated. Although Wade bears chief blame for these transgressions, the original eight directors are also culpable.

126. Wade's usurpation of control over BTW's affairs was not inevitable. The directors were empowered with the means to quash Wade's personal ambitions. Their failure to do so cannot be condoned. Wade was neither an officer or director of BTW. As BTW's attorney, he served at the board's pleasure. His services could have been terminated for his refusal to do the Board's bidding. His assumption of control is attributable to the Board's abdication of its responsibility to control BTW.

127. None of the directors are blameless. All bear responsibility for the misfortunes that beset the permittee corporation. Some walked away from BTW rather than challenge Wade. Others assisted him in removing directors who posed a threat to Wade's gameplan. Pate and Duncan never sought to regain their seats on BTW's board despite the absence of any by-laws containing explicit terms of office. Payne resigned. Also, Wilson and Campanella ultimately resigned from the board, albeit under pressure. Cordell, who has never formally resigned. has been inactive in the corporation since 1983. Woodfork and Wade were instrumental to Wade's successful removal of Wade's perceived enemies. Woodfork remained loyal to Wade and oblivious to his manipulation of her until late 1986, and Ware never deviated from her role as Wade's pawn.

128. On the basis of this record, revocation of BTW's

authorization is mandated. BTW squandered an opportunity to serve the public interest. The Presiding Judge agrees with the Bureau that it would serve no useful purpose at this late date to reconstitute a corporation whose directors were unable to exercise the control with which they had been vested.

129. Woodfork urges that she is the only qualified principal of the permittee corporation and that the permit should be awarded to her. She posits this contention on two grounds. First, she contends that her actions assisting Wade in his gaining control of BTW was the result of naivete, ignorance, and a too trusting nature. Second, she asserts that her actions following her realization in late 1986 that Wade was acting improperly make up for her earlier failings.

130. Woodfork's argument is not persuasive. Woodfork's assertion that she was naive and should not, therefore, be held accountable for Wade's misconduct is difficult to reconcile with her impressive background prior to becoming a BTW director detailed in note 6 of the findings. The decisive steps which she took following her visit to BTW's office in late 1986 also belies a claim that she was naive and inexperienced. Had she shown the same zeal earlier, when confronted with the many warning signs of Wade's increasing domination of BTW's affairs, BTW's history may have been far different. In this connection, Woodfork's change of heart came long after her helping Wade to eliminate the persons who were in the best position to steer BTW away from the course mapped out by Wade. Thus, following the March 10, 1984 election of Young and Campanella as directors, Woodfork, who admits she was then under the control of Wade, voted to void their elections and also to remove Wilson as chairman and director. In

addition, at a further meeting of BTW's Board in September-October 1984, despite Wilson's and Young's pleas that Wilson's chairmanship had been taken away from him wrongly and that Wade was assuming control of BTW, Woodfork, along with Ware, refused to hold another election. At that point, Wilson gave up his efforts to rejoin the Board and severed his ties with BTW because it was obvious to him that Ware and Woodfork were controlled by Wade and that without opening up the Board to other members, Wilson would be outvoted by them.

131. In sum, Woodfork was a key player in helping Wade consolidate his control of BTW. Unlike other directors who were guilty of failing to act, Woodfork was a participant in Wade's scheme. While her later actions are commendable, they do not explain or excuse her earlier behavior. Woodfork, like the other original directors, breached her responsibilities to the corporation by not exercising the authority with which she had been vested. There is no justification for entrusting the construction permit to Woodfork and the relief requested by her is rejected.

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules, the construction permit for Noncommercial Educational Station KEEF-TV, Los Angeles, California, held by Black Television Workshop of Los Angeles, Inc. IS REVOKED, and the captioned applications ARE DISMISSED as moot.

Joseph Chachkin
Administrative law Judge
Federal Communications Commission

APPENDIX B, FCC 93-309, rel. June 23, 1993,
8 FCC Rcd 4192 (1993)

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC.

DECISION

By the Commission:

1. Before the Commission is the Initial Decision (I.D.) of Administrative Law Judge Joseph Chachkin (ALJ), 7 FCC Rcd 7819 (1992), which revoked the permit of Black Television Workshop of Los Angeles, Inc. (BTW) to construct a non-commercial UHF television station on reserved channel 68 to serve the Los Angeles, California area./1 Exceptions to the Initial Decision have been filed by Stephen T. Yelverton, purportedly on behalf of BTW and Booker T. Wade, Jr., Rosa Ware, Gwendolyn May, and Hope Smith Bynum (the "Wade Group")/2. These Exceptions argue that the ID. should be vacated and BTW, together with the four named individuals, declared the permittees of the facility. Mary V. Woodfork also filed Partial Exceptions to the Initial Decision, contending that the permit should be reinstated and that she should be declared the sole qualified principal of BTW or, alternatively, the individual permittee of the station./3 Also before the Commission is a plethora of related pleadings, including a Petition for Reconsideration

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/1 In order to expedite this proceeding to the greatest extent possible consistent with due process, we previously directed that Exceptions to the I.D. be submitted to the Commission, not to the Review Board. 7 FCC Rcd 2716.

of Memorandum Opinion and Order, 7 FCC Rcd 6868 (1992) and a Petition for Reconsideration of Order, FCC 921-094 (released January 14, 1993)./4

2. This proceeding has a long and convoluted history. BTW was authorized by the Commission to construct the Channel 68 noncommercial television station in 1983, and in early 1987 KEEF-TV began broadcasting. On August 8, 1987, however, the Mass Media Bureau ordered it off the air for operating at variance from the facilities authorized in the construction permit. Also in 1987 a dispute over control of BTW came to the Commission's attention when three of the eight original directors, including Woodfork, submitted informal objections to various BTW applications and requests, arguing that such filings by Wade, purportedly BTW's counsel, were ultra vires. Following an investigation, the Commission concluded that the dispute raised substantial and material questions of fact about whether there had been an unauthorized transfer of control of BTW and about BTW's qualifications to be a permittee or licensee. This proceeding was therefore instituted to determine whether BTW's construction permit should be revoked. The issues specified in the Hearing Designation Order (HDO), 3 FCC Rcd 5443 (1988), were, in summary, as follows:/5

(a) whether an unauthorized transfer of control of BTW had occurred and, if so, whether the transfer was due to the malfeasance, misfeasance, or nonfeasance of any of the original eight directors, any of the persons now claiming control of BTW, or any other person associated with BTW;

(b) whether any of the aforementioned made misrepresentations to the Commission, were lacking in candor in their dealings with the Commission, or

attempted to mislead or deceive the Commission concerning the true ownership and control of BTW;
(c) whether any of the aforementioned violated 47 C.F.R. 73.3613(b);
(d) whether any of the afore- mentioned is qualified to be a permittee of the relevant facility;
(e) in light of the above, if it is determined that revocation is not warranted, whether grant of the relevant permit to any of the aforementioned will serve the public interest.

3. After several years of delay,/6 the hearing was held in April and May of 1992, with the ALJ subsequently recommending revocation of BTW's permit. We have carefully reviewed the record and pleadings before us. We adopt the ALJ's findings and conclusions, except as modified herein, and we affirm his decision. Before discussing that conclusion, however, we will address the two Petitions for Reconsideration of ancillary Commission actions that are also before us.

4. Petition for Reconsideration of 7 FCC Rcd 6868. By Memorandum Opinion and Order, 7 FCC Rcd 6868 (1992) (MO&O), we denied an appeal filed by the Wade Group that challenged an April 29, 1992 bench ruling by the ALJ permitting the testimony of Michele Moore, Esq. during the revocation hearing. We also dismissed an Application for Review filed by Wade of the General Counsel's Order which dismissed on procedural grounds Wade's separate pro se appeal of the ALJ's bench ruling,/7 concluding that Wade could not simultaneously exercise the right to self-representation and be represented by Yelverton. Yelverton has now filed a Petition for Reconsideration of the MO&O on behalf of the Wade Group./8 Wade also individually filed a Motion to Stay this proceeding pending judicial

/2 The four named individuals claim to be the current directors of BTW. However, whether they in fact represent the corporate entity is one of the core questions at issue. Whether their lawyer Yelverton represents the corporate entity is accordingly also at issue. See I.D. at n. 1. In response to the ALJ's ruling that Yelverton does not represent the corporate entity, id., Yelverton filed a Notice of Appearance on behalf of BTW on November 30, 1992. Woodfork filed "Comments" on the Notice of Appearance on December 10, 1992, the Wade Group filed a Motion to Strike the comments as an unauthorized pleading on December 22, 1992, Woodfork opposed the Motion to Strike on December 28, 1992, the Wade Group filed a Motion to Strike Woodfork's Opposition on February 1, 1993, and Woodfork opposed that Motion to Strike on February 3, 1993. We are dismissing Yelverton's Notice of Appearance as moot, since it is redundant of a Notice of Appearance he filed on November 8, 1988 on behalf of the Wade Group and BTW, as that entity was and is defined by the Wade Group. We are also dismissing as moot the Wade Group's Motion to Strike Woodfork's Comments on the Notice of Appearance and their Motion to Strike Woodfork's Opposition to their first Motion to Strike.

/3 The Exceptions were filed on January 4, 1993, and on January 21, 1993, the Wade Group, Woodfork, and the Mass Media Bureau all filed Replies to Exceptions. On January 25 Woodfork filed a request that the Commission hear oral argument on her Exceptions, and on January 28 the Wade Group also filed a Request for Oral Argument. On January 29 Woodfork filed a Motion to Strike the Wade Group's Request, and on February 3 the Mass Media Bureau filed a Motion to Dismiss the Request. On February 9 the Wade Group filed oppositions to Woodfork's Motion to Strike and

to the Bureau's Motion to Dismiss. The parties' views have already been fully delineated in the numerous pleadings submitted in this proceeding and we do not believe that oral argument would serve any useful purpose at this time. In light of that fact and of our earlier decision that the public interest requires expediting this proceeding to the greatest extent possible, see note 1 supra, we are denying Woodfork's and the Wade Group's requests. Accordingly, we are dismissing Woodfork's Motion to Strike and the Bureau's Motion to Dismiss as moot.

/4 See also notes 2 and 3 supra.

/5 I.D. at 3.

/6 The delay was precipitated by an application to assign the station's permit under the Commission's minority distress sale policy and various pleadings filed in response to the Commission's action on that application, which was never approved.

/7 FCC 92I-037, released May 14, 1992.

/8 On December 15, 1992, the Mass Media Bureau filed an Opposition to the Petition for Reconsideration and on December 22 the Wade Group filed a Reply.

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judicial review of the MO&O./9 However, the United States Court of Appeals for the District of Columbia Circuit recently dismissed Wade's judicial appeal as "incurably premature," and Wade's Motion to Stay is therefore dismissed as moot./10

5. In the Petition for Reconsideration, the Wade Group again contends that Moore provided legal representation to BTW in earlier years and that the attorney-client privilege therefore precluded her testimony concerning BTW during the hearing. Since they fail to make any argument or give any version of the facts that we did not consider in reach-

ing our earlier determination, we deny the Petition to the extent it asks us to deliberate on that matter again. See WWIZ, Inc., 37 FCC 685 (1964), aff'd sub nom. Lorain Journal Co. v. FCC, 351 F.2d 824 (D.C. Cir. 1965), cert. denied, 383 U.S. 967 (1966)./11

6. We also reject the argument that we erred in up holding the General Counsel's dismissal of Wade's individual pro se appeal of the ALJ's ruling permitting Moore's testimony. The Wade Group argues that Wade had a separate right to object to Moore's testimony on the basis of his relationship with several companies other than BTW and Moore's very limited testimony concerning those companies. Though the claim now is that Yelverton does not represent Wade vis-a-vis those named companies, Yelverton has consistently filed pleadings on behalf of both BTW and Wade individually and, prior to the pleadings concerning Moore's testimony, there has been no indication that his representation of Wade was selective. Even the instant pleading contradicts itself on that point. Yelverton continues therein to assert Wade's interests and, most notably, states that during the hearing he was representing Wade "as an individual party" and attempted to stop Moore's testimony by asserting the attorney-client privilege "on behalf of Wade as an individual, ... includ[ing on behalf of] companies controlled by Wade, but separate from Workshop." In light of these facts, and in light of the clear precedent proscribing dual self-representation and representation by counsel, see 7 FCC Rcd at 6870 6, the request for reconsideration of our earlier decision upholding the dismissal of Wade's pro se appeal on procedural grounds must be denied./12

7. Petition for Reconsideration of FCC 921-094. By Order, FCC 921-094 (released December 15, 1992), the General

/9 Wade filed a Notice of Special Appearance for the limited purpose of filing the Motion to Stay. On January 14, 1993 Woodfork filed an Opposition to the Motion to Stay, and the Mass Media Bureau did likewise on January 25.

/10 No. 92-1621, decided March 5, 1993. The Court noted that, in the Petition for Reconsideration filed November 30, Yelverton purports to represent not only BTW but also Wade individually. It thus dismissed Wade's appeal on the grounds that he could not simultaneously seek agency reconsideration and judicial review.

/11 In any event, the Wade Group's arguments on that subject are in essence moot. The ALJ did not rely on Moore's testimony in the I.D. except for very limited background information, which information was also provided by other witnesses. I.D. at 6-8, 10. Likewise, we are affirming the I.D. without reliance in a single instance on Moore's testimony.

/12 Even if Wade's appeal had not been dismissed on procedural grounds, it would have failed on its merits. Wade's pleading,like the one filed by Yelverton on behalf of the Wade Group, did not attempt to show that the elements necessary to establish attorney-client privilege are applicable to Moore's testimony. See also, note 11, supra.

Counsel, pursuant to delegated authority, denied a request filed by the Wade Group to expand the page limitation specified in 47 C.F.R. 1.277(c) for Exceptions to an Initial Decision from 25 pages to 50 pages./13 The Wade Group has filed a pleading entitled "Petition for Reconsideration" of that Order./14 In fact the pleading is an addendum to their January 4 Exceptions, since seven of the eight pages submitted recite additional Exceptions. The single paragraph challenging the substance of the decision merely

/13 The Wade Group requested that the deadline for filing Exceptions in the instant case be extended from December 31, 1992 to January 4, 1992. That request was granted.

/14 On January 22, 1993 the Mass Media Bureau opposed the Petition for Reconsideration, and on January 27 Woodfork filed a Motion to Dismiss the Petition, or, alternatively, to strike it. On February 1, the Wade Group filed a Reply to the Bureau's Opposition and an Opposition to Woodfork's Motion to Dismiss. On February 3 Woodfork filed a Motion for Leave to File a Reply Pleading and a Reply to the Wade Group's Opposition, and the Wade Group opposed Woodfork's February 3 motion on February 9. In light of our action herein, Woodfork's Motion to Dismiss, Motion for Leave to File Reply Pleading, and Reply pleading are dismissed as moot.

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raises one of the same arguments previously considered by the General Counsel -- i.e., that the 25-page limit is insufficient to permit discussion of all questions at issue here -- and we agree with the General Counsel that the argument is without merit since the I.D. is neither inordinately long nor complex.

8. The I.D. As stated, both Woodfork's Exceptions and the Wade Group's Exceptions urge that the ALJ erred in revoking the BTW permit, but each party maintains that it is the legitimate permittee. Woodfork's Exceptions are limited to challenging the ALJ's conclusions concerning her own role in what the ALJ determined to be an unauthorized transfer of control. The Wade Group's Exceptions, on the other hand, challenge almost every finding of fact and conclusion of law, asserting the ALJ erred in relying on the testimony of Woodfork and two other members of the original Board of Directors of BTW and in

rejecting as not credible the testimony of Wade's sister Rosa Ware.

9. The basis of the Wade Group's argument that the ALJ erred in relying on the testimony of Woodfork and two other original BTW Board members, Clint Wilson and Roy Campanella, Jr., is essentially that the testimony is unreliable because the witnesses are not "disinterested" parties and because they are hostile to Wade./15 We disagree. It is within the ALJ's broad discretion in conducting hearing matters to consider animosity in weighing a witness' credibility, but the fact that a witness dislikes a party is clearly not in itself sufficient to require that his testimony be disregarded./16 In the instant case, the ALJ had ample opportunity to observe the witnesses himself, and

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/15 In a lengthy catalog of Exceptions to specific findings in the I.D., the Wade Group repeatedly asserts that the testimony which served as the basis for the findings must be rejected because it is "uncorroborated, unsupported, and biased" or "self-serving." See, e.g., Exceptions at 58-69.

/16 WWLE, Inc. 85 FCC 2d 68 (1971), cited by the Wade Group, stands only for the proposition that the ALJ can consider a witness' bias in evaluating his credibility, not for the proposition that a witness must be disqualified if he exhibits any degree of bias. Id. at 86 27. Janice Surber, 5 FCC Rcd 6155, 6158 (1990), also cited, concerns the admissability of hearsay evidence and is inapposite here.

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the Wade Group had ample opportunity through cross-examination to convince the ALJ that their negative view of Wade was so intense that they were not credible. It is clear from the I.D. that any such attempts failed; the ALJ explicitly found Campanella's testimony "without question

articulate, compelling, and entirely credible" and implicitly reached the same conclusions about Wilson and Woodfork./17 As we have repeatedly held, his credibility findings are accorded great weight and should not be reversed unless they are patently in conflict with the record evidence./18 We see no such conflict. The testimony of each of the three witnesses is internally consistent, and, contrary to the Wade Group's contentions, generally consistent with and corroborative of the testimony of each other./19 Only the testimony of Wade's sister Rosa Ware contradicts that of Woodfork, Wilson, or Campanella in any significant way, and the record supports the ALJ's conclusion that it is Ware, not the other witnesses, whose testimony must be discredited because of her lack of recall and because her testimony is in critical aspects internally inconsistent and/or inconsistent with documentary evidence. I.D. at 48, 116, n.12, n.15./20 /21

10. We turn now to Exceptions charging that the ALJ distorted the factual record and erred when he concluded that an unauthorized transfer of control of the reserved channel 68 permit occurred, I.D. at 125; that misrepresentations were made and/or a lack of candor displayed to the Commission concerning control of the permittee, id.; that violations of 47 C.F.R. 73.3613(b), requiring the filing of pertinent documents, occurred, id.; that the eight original members of the Board of Directors,including Woodfork, contributed to the unauthorized transfer of control by failing to exercise their authority, id.; that none of the persons or groups named in the proceeding possess the qualifications to be a permittee, id. at 125-128; and that the permit must therefore be revoked, id. at 128. Having carefully reviewed the record, Exceptions, and I.D., we conclude that a preponderance of the evidence fully supports the ALJ's determinations.

/17 The Wade Group contends that the ALJ committed reversible error when he refused to accept as rebuttal evidence an affidavit of Charles Eure of Coast TV, which, according to the Wade Group, contradicts Woodfork's testimony. In fact, the affidavit was not offered or rejected as rebuttal evidence. It was attached to one of five motions to enlarge issues against Woodfork filed after the close of the record. The ALJ denied the motion to enlarge, Memornndum Opinion and Order, FCC 92M-805, released July 22, 1992, and no timely exception to that ruling has been filed. In any event, having reviewed the affidavit, we conclude that it does not raise questions about Woodfork's credibility.

/18 See, e.g., Naguabo Broadcasting Co., 6 FCC Rcd 912, 919 (Rev. Bd. 1991), rev. denied, 6 FCC Rcd 4879 (1991).

/19 The Wade Group complains that the Mass Media Bureau did not subpoena certain other witnesses, including former original directors Titilola Payne Parker and Gary Cordell and purported current directors Gwendolyn May and Hope Smith Bynum. See I.D. at n.5. They intimate that, if these witnesses had testified, the evidence would have mandated different conclusions. The Wade Group of course could have called these witnesses. In fact, the Wade Group presented no witnesses at all. Having previously foregone the opportunity to rebut the testimony of witnesses who did appear, it cannot now complain that the record does not adequately reflect the circumstances as they occurred. See Washoe Shoshone Broadcasting, 3 FCC Rcd 3948, 3953 (Rev. Bd. 1988), recon. denied, 3 FCC Rcd 5631 (Rev. Bd. 1988), app. for rev. dismissed, 5 FCC Rcd 5561(1990). Furthermore, contrary to another implication in the Exceptions, it is not a routine requirement that the ALJ delay commencement of the rebuttal case or receipt of rebuttal evidence pending review by the lawyers of the transcript of the direct case.

/20 We reject the bare argument that Ware is a party to this proceeding and that, under F.R. Evid. 615(1), the ALJ wrongfully sequestered her when he prohibited counsel from discussing Woodfork's testimony until after Ware testified so that her testimony would not be colored by Woodfork's. Despite several weeks' notice, Ware failed to appear on the day when she had been called to testify, informing the ALJ through counsel that she would not appear unless she was subpoenaed. This last-minute default precipitated a lengthy delay in the proceeding, see Tr. at 493-517. Furthermore, it disrupted presentation of the direct case, since the Mass Media Bureau, which had the burden of proceeding with the evidence, had planned to present first the testimony of Wade (who also failed to appear without notice), second the testimony of Ware, and third the testimony of Woodfork. Given these facts, the ALJ's action was within the broad discretion afforded him in conducting hearing matters. See 47 C.F.R. 1.351; 47 C.F.R. 1.243. As the courts have recognized, F. R. Evid. 615(1), which generally exempts parties from sequestration orders, does not necessarily apply with equal force to individuals testifying at administrative proceedings when the presence of the witness is not necessary for the effective advocacy of the cause as it does to individuals testifying at ordinary civil proceedings. In NLRB v. Stark, 525 F.2d 422, 429-30 (2d Cir. 1975), cert. denied 424 U.S. 967 (1976), for example, the court held that the ALJ abused his discretion in refusing to sequester individual discriminatees testifying against their employer at an NLRB proceeding, though arguably under Rule 615(1) they could not have been sequestered in a civil proceeding. Noting that the importance of their presence "at every moment" of the hearing did not outweigh the danger that their own self-interest would cause them to shape their

testimony according to other testimony they heard, the court held that, absent a "particularized showing of need ... to hear other[] evidence," they should have been sequestered. See also, Caleshu v. U.S., 570 F. 2d 705, 711 (8th Cir. 1978). Finally, we note that our resolution of this question is also supported by the fact that, after Ware gave direct testimony, she could have discussed Woodfork's earlier testimony with counsel and refuted that testimony during presentation of the rebuttal case. As noted in note 19, swpra, Ware did not avail herself of this opportunity.

/21 We reject the Wade Group's contention that the ALJ "interrupted" and "testified for" Wilson when Wilson was cross-examined about a letter written by his attorney. The record shows that counsel asked a question concerning Wilson's knowledge of a meeting the letter referenced and Wilson answered the question by indicating he wasn't at the meeting and that his second-hand knowledge of what happened there was limited to what was stated in the letter and a telegram he received. Tr. at 1761. Thereafter, the ALJ cut off counsel's plainly repetitious line of questioning. Tr. 1762, 1764. Though the exchange reflects the ALJ's frustration with counsel, his attempt to prevent what he concluded was an effort to harass the witness was clearly within the bounds of his authority. 47 C.F.R. 1.243; Tr. 1766.

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11. Unauthorized Transfer of Control. Section 310(d) of the Communications Act, 47 U.S.C. 310(d), prohibits unauthorized transfers of control of Commission permittees and licensees./22 As the ALJ noted, a legal or dejure transfer of control of a nonprofit, nonmembership corporation such as BTW can occur in several circumstances, including when there is a significant change in the Board of Direc-

tors. I.D. at 91. As he also noted, a de facto transfer of control of a permittee occurs when those named to the governing board cannot or do not exercise the control with which they have been vested. Id. A transfer of control that has been concealed from the Commission through misrepresentation or lack of candor/23 warrants revocation of the permittee's or licensee's authorization. See, e.g., Silver Star Communications, 6 FCC Rcd 6905, 6907 (1991).

12. In BTW's case, the initial application and an amendment thereto named eight individuals as the governing body of BTW, and the Commission approved the qualifications of those individuals. The Wade Group, which now claims control of BTW, consists of four individuals -- Wade, Ware, Bynum, and May -- and only one of those, Ware, was in the list of eight approved directors. I.D. at n.1, 3 n.3./24 The names of Wade, Bynum, and May have never been submitted to the Commission for approval,/25 nor was the Commission kept informed of the departure of the original Board members. I.D. at 55.

13. The Wade Group asserts that such deletion and addition of BTW directors cannot be considered in determining whether section 310(d) was violated because "[t]he FCC has no policy for determining when a transfer of control of a non-stock entity [such as BTW] has occurred." In support of this argument. BTW points out that we have issued a Notice of inquiry (NOI) proposing general principles for determining when transfers of control of certain non-stock entities occur./26 The Wade Group thus apparently believes that, pending completion of the proceeding initiated by the NOI, the Commission is without power to enforce Section 310(d) in the case of non-stock permittees or licensees. We reject that suggestion. As the NOI makes clear, our current and long-standing policy vis-a-vis non-stock entities is to

/22 Section 310(d) states in pertinent part as follows:

> No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of In any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.

/23 See I.D., 109, as to misrepresentation and lack of candor.

/24 It is unclear how and why May and Bynum became associated with BTW. May, Wade's cousin, was purportedly hired as a "contract employee" of BTW in 1984. I.D. at 47. Bynum (formerly Hope Smith), is listed on Mass Media Bureau Exhibit 3, a February 18, 1981, document entitled "Action of Organizer-Incorporator," as a Director and Assistant Secretary of BTW. However, it appears that members of the Board who were approved by the Commission (possibly excepting Ware) were unaware of Bynum's role.

/25 Wade himself was listed only as BTW's counsel. I.D. at 27.

/26 4 FCC Rcd 3403 (1989).

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determine transfer of control issues on a case-by-case basis. 4 FCC Rcd at 3410 n.25. Moreover, even if and when the NOI is completed, "we will continue to address [these issues exclusively on a case-by-case basis" unless the non-stock entity in question has both of two specified characteristics. Id. BTW does not have both of these traits/27 and the transfer of control issue would therefore be resolved in

any event not on the basis of the NOI, but rather based solely on an examination of the facts presented./28 The facts show that BTW's eight member Board was the purported sole locus of control of the corporation. While they expected guidance from Wade on matters related to BTW's dealings with the Commission, they did not expect nor was it represented to the Commission that Wade or any other individual or entity would oversee their activities or monitor their actions. See I.D. at 30. Changing the locus of control by replacing seven of the eight members of the Board with three new members in itself constituted a de jure transfer of control that could not properly be effectuated without Commission approval./29 Thus the Wade Group has no legitimate claim to BTW's permit./30

/27 The entity must (1) have a governing board that directs the operations of the licensee and (2) operate pursuant to a written organizational document that specifies the rights and duties of the governing board and other participants, if any. 4 FCC Rcd at 3404 10. The evidence here overwhelmingly supports the ALJ's conclusion that BTW did not operate under any such organizational document. See 16 infra.

/28 If the matters considered in the NOI in fact had any relevance to BTW, they would, contrary to the Wade Group's argument, support a finding that the changes in BTW's Board constituted a transfer of control. Of the types of non-stock entities described in the NOI, BTW is most closely analogous to entities with self-perpetuating Boards, i.e. entities where ultimate control lies in the Board, not some oversight group. For those organizations, the NOI would treat any changes in Board composition, gradual or abrupt, as a transfer of control, since there is no superior control group. 4 FCC Rcd at 3406, 22.

/29 The Wade Group cites Seven Locks Broadcasting Co., 94 FCC 2d 899 (1983), for the proposition that the Commission has refused to decide transfer of control questions for non-stock entities because it has "no articulated policy" on the matter. While the Commission did in fact decline to add an unauthorized transfer of control issue against Seven Locks, the question there was very different from the one presented here. In Seven Locks a membership body had ultimate control over the governing board. id. at 901 3-4. But see, Pacifica Foundation, 41 FCC2d 71, 72 (Rev. Bd. 1973) (Review Board found changes in governing board of non-commercial educational applicant constituted a transfer of control but declined to add a Section 310(d) issue because, inter alia, it was unclear what significance the governing board had and there was no indication the entity had acted in bad faith in failing to file for approval of the transfer of control). Pacifica Foundation is clearly distinguishable from the instant case because, as noted, BTW's Board purportedly had ultimate control and because, as reflected in 21-26 infra, BTW made numerous misrepresentations to the Commission.

/30 Citing Policy Statement, Tender Offers and Proxy Contests, 59 RR 2d 1536 (1986), the Wade group also contends that the changes in BTW's Board were "gradual" rather than "abrupt" and that this distinction further dictates against a conclusion that an unauthorized transfer of control occurred. However, the Policy Statement is inapposite. While we did in fact there conclude that gradual changes in the Board of a stock company may not under certain circumstances constitute a transfer of control requiring Commission approval, even if eventually a majority of the Board changes, we based that conclusion on the fact that, in stock companies, it is generally the members or shareholders

who have ultimate control of the corporation. id. at 1545 n.40, citing Storer Communications, inc., 57 RR 2d 1651 (1985), aff'd 763 F. 2d 436 (D.C. Cir. 1985). In Storer, as well as in WWOR-TV, 6 FCC Rcd 193 (1990), which are both also cited by the Wade Group, our decisions that changes in Board members constituted insubstantial changes in control requiring approval only on a modified short-form or short-form application, were likewise premised on the fact that shareholders held ultimate control of the relevant corporations.

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14. In any event, we agree with the ALJ that the record shows Wade himself, not the original Board or the "reconstituted" Board that now claims authority, unilaterally exercised de facto control of BTW from shortly after the grant of the permit, if not well before, thus providing a separate ground for concluding that section 310(d) has been violated./31 While the Wade Group argues that literally all of the ALJ's factual findings underlying this conclusion are "reckless," "absurd," and contradicted by the evidence, it is the Wade Group's version of events that is baseless. See 9 and n.19, supra.

15. The ALJ's key findings can be summarized as follows: that Wade was motivated to control BTW by his plan to establish a for-profit production company that would sell programming to BTW's station, I.D. at 27;/32 that he "handpicked" directors who, with one exception, knew little about broadcasting and would likely defer to his expertise, I.D. at 13, 18, 30; that he purposefully frustrated the efforts of other directors to further BTW s interests, I.D. at 31-36; that he prevented the directors from properly organizing by withholding by-laws from them, I.D. at 37-40; that without by-laws establishing

/31 The Wade Group complains that the ALJ erred in finding that Wade exercised control of BTW during the application and pre-grant period because, while the HDO specified an issue as to control of the permittee, it did not refer to the applicant or specify a real-party-in-interest issue. It is unnecessary to address this question, since Wade's exercise of control over BTW is clearly established without reference to pre-grant activities.

/32 Wade also planned to sell programming to a network of low-power stations he hoped to establish. Id.

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terms of office, he forced the ouster of Board members at will and orchestrated a May 1984 meeting wherein the election of new Board members was voided,/33 Wilson was removed as Chairman, and Ware was "elected" acting Chairman, I.D. at 39-40, 44-47, 49-54; that shortly thereafter, with an active Board consisting only of Ware and Woodfork,/34 Wade began to run Board meetings himself and to inform Woodfork about BTW's affairs on a "need-to-know" basis, I.D. at 47-48, 55-56, 74; that he subsequently held himself out in various meetings and documents, including certain FCC filings, as a Vice President and Director of BTW, though he was not elected to those positions. I.D. at 61-68, 82; that he took numerous significant actions on behalf of BTW without first obtaining the consent of Woodfork, including, inter alia, attempting to amend the articles of incorporation, entering into a loan agreement that pledged BTW's assets as collateral, and applying for an extension of BTW's construction permit, I.D. at 62, 71, 73; that he controlled BTW's finances through Ware, whom he had earlier appointed Treasurer, to such an extent that Ware and Wade cosigned checks payable to Wade when there was no documentation

of his expenses, I.D. at 28-29, 65, 75-79; that a friend of Wade's, with no connection to BTW, sometimes signed Ware's name to checks, I.D. at 78; and that, when Woodfork finally challenged Wade's actions, he notified her that her term as a BTW director had expired, as he had done with other Directors in the past, I.D. at 79-81./35

16. The Wade Group's seriatim attack on these findings is contradicted in every material respect by the record. They contend that the ALJ's finding that Wade was motivated to control BTW by his plan to establish a for-profit production company was based only "on Campanella's uncorroborated and not disinterested testimony," but in fact Campanella, Wilson, and Duncan all gave supporting testimony./36 Tr. at 1617, 1700-1702, 1504-1505. Concerning the finding that Wade constantly frustrated the efforts of other Directors, they argue that Wade cannot be faulted because he had no duty to assist. This position is in itself questionable, given Wade's role as attorney and "business agent" to the corporation. In any event, it ignores extensive record evidence that Wade's repeated failure to cooperate with Directors he himself had selected was key to their ultimate disillusionment with BTW and to Wade's ability to oust them without significant challenge. I.D. at 40, 53-54. The Wade Group also disputes that Wade withheld by-laws from the Directors and thus prevented them from properly organizing, arguing alternatively that the Directors knew by-laws were not necessary for them to function/37 and that, in any event, he presented by-laws to them as early as 1984. However, virtually all of the Directors who testified except Ware indicated frustration at Wade's repeated refusals to present by-laws outlining their responsibilities, and Ware's testimony that Wade distributed by-laws at a 1983 meeting was specifically found unbeliev-

able for at least three separate reasons. I.D. at 37-40 and n.12./38

/33 The meeting was attended only by Wade, Woodfork, Ware,and Payne.

/34 The Wade Group states in Exceptions that Payne left the Board in August 1984. See also, I.D. at 55 a. 17.

/35 Woodfork attempted to bring in an outside party to examine the books, which Wade prevented. Id.

/36 The Wade Group correctly points out that the ALJ erred in finding that, of the original eight directors, only Duncan and Pate knew each other. I.D. at 13. Duncan and Campanella also knew each other. Tr. at 1544. This point is not decisional.

/37 In support of this contention, the Wade Group correctly points out that the Board did not adopt by-laws drafted by Duncan and that an outside attorney who Wilson asked to help find Wade's by-laws did not draft new by-laws for adoption. However, the record reflects that Duncan's by-laws were not adopted in large measure because Wade, BTW's attorney, ignored them. I.D. at 31. It also reflects that Wilson did not ask the outside attorney to draft by-laws because he was confused about the implications of operating under new by-laws when Wade said by-laws already existed, not because he thought they did not need by-laws. I.D. at n.11.

/38 The Wade Group claims that a June 14, 1984 letter from Wilson's attorney to Woodfork, Wade, Parker, and Ware confirms that the by-laws were presented at an earlier Board meeting. However, the letter reflects only that the attorney was told by an unidentified source -- possibly Wade himself -- that by-laws existed. Specifically, the letter states that, under California law, it "is very important that the

books and records of a corporation be maintained at the principal place of business so that they are easily accessible to officers, directors, and others who are legally entitled to review them. There can be no doubt that ... Mr. Wade ... maintained control over the by-laws, refusing to deliver them after numerous requests." Thus, to the extent the letter supports any witness' testimony, it supports that of Woodfork, Campanella, and Wilson, not Ware.

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17. Concerning the ALJ's finding that the absence of by-laws establishing terms of office permitted Wade to remove Directors at will, the Wade Group submits that the Directors agreed to certain staggered terms of office. Campanella, Pate, Woodfork, and Duncan, testified to the contrary, and Wilson testified only that Wade may have told him he had a limited term. I.D. at 16, 18-20, 40. They also contend that it was Wilson, not Wade, who informed Campanella, Pate, and Duncan that their terms had expired, that Pate and Duncan declined to seek reelection, that Campanella, though reelected, later "voluntarily resigned," and that Wilson also "voluntarily resigned" after Woodfork, Ware, and Parker removed him as Chairman. But the record clearly shows that Wilson notified Campanella, Pate, and Duncan of their expired terms only at Wade's direction. I.D. at 39. Furthermore, while it is true that Pate and Duncan decided not to seek reelection because, at least in Pate's case, BTW's lack of organization was too frustrating, it grossly distorts the record to say that Campanella and Wilson "voluntarily resigned." As noted, Wade himself orchestrated the May 1984 meeting where Campanella's reelection was voided and Wilson was removed as Chairman, and Wilson subsequently received a telegram notifying him that he had been removed from the

Board altogether. I.D. at 45-46, 50-52. Thereafter, Wilson and Campanella did in fact execute a formal agreement whereby they agreed to resign In exchange for an indemnification agreement from BTW. I.D. at 53. Given the preceding circumstances, such action hardly constituted "voluntary" resignations.

18. Concerning Wade's control of BTW's finances, the Wade Group contends that, after the Board was reduced to Ware and Woodfork, they named Wade General Manager and that money Wade received was only reimbursement for his moving expenses and living expenses while acting as General Manager. They argue that Woodfork and Ware agreed to make such payments to Wade, that Woodfork agreed that Ware and Wade could co-sign the checks, and that Wade's friend Arlene Stevens also had authority to sign checks. However, there is no evidence in the record that such financial arrangements existed other than the unreliable testimony of Ware. See 8 supra. Contrary to the Wade Group's claim, Woodfork's testimony does not indicate that she ever agreed to reimbursement payments to Wade or that she approved Ware and Wade as co-signatories./39 Furthermore, Ware admits that, though she consented to Stevens signing checks for her, there was never any Board action approving Stevens as a signatory, that nonetheless Stevens and Wade often co-signed checks, and that Wade was not required to submit any documentation before receiving funds. Tr. at 1047-1049, 1121-1122, 1231-1232. Thus even Ware's testimony indicates that Wade in essence controlled BTW's finances.

19. Finally, the Wade Group argues that actions cited by the ALJ as evidence of Wade's control of BTW after the Board was reduced to Woodfork and Ware were actions legitimately taken in his capacity as General Manager. It

notes that Woodfork and Ware told Wade to do whatever was necessary to make the station operational, that he did not need Commission authorization to act as General Manager, and that, as General Manager, he could conduct the day-to-day operations of BTW without raising transfer of control issues. Citing David A. Davila, 6 FCC Rcd 2897 (1991), it concludes that there was merely a permissible "delegation of authority" from the Board to him.

20. The reliance on Davila is misplaced. That case indicates only that an agent or employee can conduct the daily affairs of a station "if guided by policies set by the permittee." Id. at 2899 12. Assuming Woodfork and Ware could legitimately establish station policy as the only surviving directors of BTW, it is clear from the record that they did not do so. Rather, Wade did. Other Board members testified that both Woodfork and Ware were under Wade's control even in earlier times, I.D. at 40, 52, Woodfork readily admits that she was under Wade's control until approximately September 1986, I.D. at 52, and Ware's actions demonstrate her lack of independence from him. See I.D. at 44 n. 14, 76. Through Ware, Wade had control of BTW's finances, and, given Woodfork's and Ware's deference to him, he was able to make virtually unrestricted decisions on behalf of BTW. The record thus presents not an instance of "delegation of authority," but a classic example of an unauthorized transfer of de facto control in violation of 47 U.S.C. 307(d). See Southwest Texas Public Broadcasting Council, 85 FCC 2d 713, 715 (1981), citing WHDH, Inc., 17 FCC 2d 856 (1969), aff'd 20 RR 2d 2052 (D.C. Cir. 1970.) This transfer of de facto control, as well as the transfer of de jure control discussed supra, warrants revocation of the BTW permit if the transfer was intentionally concealed from the Commission

through misrepresentation or through a lack of candor, including evasion or a failure to be forthcoming./40

21. Misrepresentation/Lack of Candor; Section 72.3613(b) Violations. We agree with the ALJ that in this case "the record is replete with instances" in which documents filed with the Commission contain misrepresentations and/or display a lack of candor concerning who was in control of BTW. I.D. at 110./41 Specifically, the evidence shows that documents were filed on behalf of BTW that (i) misrepresented that Board members had performed certain duties or authorized certain acts they did not in fact perform or authorize, (ii) until March 1985, did not disclose Wade's own role in BTW's affairs as anything more than that of legal advisor to BTW/42 and (iii), after that time, misrepresented Wade as an officer and director of BTW when in fact he had no legitimate claim to those titles. We further agree that the record demonstrates that in several instances the necessity of filing corporate documents was disregarded altogether in violation of 47 C.F.R. 73.3613(b). I.D. at 119-120.

/39 Woodfork's testimony indicates that she was aware of their authority to sign checks and that she ultimately asked Wade and Ware if she too could have signatory authority. They agreed in order "to appease" her. Tr. at 642.

/40 See Silver Star Communications, 6 FCC Rcd 6905, 6907 20 (1991). See I.D. at 109, discussing misrepresentation and lack of candor.

/41 In addition to specific complaints concerning the ALJ's conclusions on the issue of misrepresentation/lack of candor, the Wade Group argues generally that the ALJ failed to support his conclusions with citations to the record, that there was no evidence of Wade's intent to deceive since Wade

never testified and his state of mind could therefore not be ascertained, and that the conclusions were based on Woodfork's testimony, which was not credible. These contentions are without merit. The ALJ's conclusions on the misrepresentation/lack of candor issue (I.D. at 109-118) are based on his preceeding findings of fact (I.D. at 6-88), which are amply supported by references to the record. Intent is a factual question that can be inferred if other evidence shows that a motive or logical desire to deceive exists, as is the case here. See Calf. Public Broadcasting Forum v. FCC, 752 F. 2d 670, 679 (D.C. Cir. 1985); Scott & Davis Enterprises, Inc., 88 FCC 2d 1090, 1100 (Rev. Bd. 1982). Concerning Woodfork's credibility, see 9 supra.

/42 On March 18, 1985, Wade filed an Ownership Report identifying himself as BTW's Vice President. I.D. at 62.

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22. The ALJ points to BTW's November 1981 application as the first example of a BTW document filed with the Commission that contained various misrepresentations. Again putting aside the question of whether the Board of Directors represented in the application as the corporation's governing body in fact had any authority over the corporation ab initio,/43 it is clear that, at a minimum, the application misrepresents the Board's role in preparing and authorizing the filing of the application. I.D. at 16-19. We reject the Wade Group's contrary position./44 Similar misrepresentations were made in at least three subsequent documents, an August 25, 1986 Application for Extension of Construction Permit, a March 1985 Ownership Report, and an August 25, 1986 request for extension of time. I.D. at 73, 112, 115.

23. The ALJ also points to various documents filed with

the Commission wherein individuals were listed as officers who in fact were not elected as officers but were instead "appointed" by Wade. I.D. at 22, 28-29, 111-112. The Wade Group objects to the ALJ's characterizing these listings as "misstatements," arguing that Wade thought he had authority as BTW's incorporator to appoint officers. That the "officer's" names were therefore submitted to the Commission in good faith," and that no misrepresentation was involved since the filings did not specify whether the individuals were "elected" or "appointed." This position, however, is not only unsupported by the record,/45 it is without logic. If Wade's authority over BTW as incorporator was in fact so great as to permit him to appoint all of BTW's officers and directors indefinitely, that fact in itself is strong evidence that Wade had control of BTW's affairs and that his qualifications to be a Commission permittee should have been submitted for approval instead of, or at least together with, those of the eight individuals on whose qualifications the Commission did pass.

24. The Wade Group likewise contends that there was no misrepresentation when Wade submitted his own name on 1985 and 1987 Ownership Reports as an officer and director because he believed "in good faith" that he held those positions at the time. However, documents purportedly executed by or on behalf of Ware and Woodfork belie this contention. In a May 18, 1985 Ownership Report, giving information effective as of January 14, 1985, Wade represented himself as BTW's Vice President. ID. at 113. Yet, the record contains a corporate resolution dated almost eight months after the effective date of the information in the Ownership Report and signed by Ware and Stevens, supposedly for Woodfork./46 By the resolution, Wade was "elected" Vice President. I.D. at 64. We agree with the

ALJ that the resolution in itself appears to be a fabrication. I.D. at 65, 113. In any event, the fact that Wade's sister and his friend found it necessary to execute a document electing Wade as BTW's Vice President in September 1985, makes it unlikely that Wade legitimately believed he held that position eight months earlier./47 Likewise, an April 1, 1987 Ownership Report, effective November 18, 1985, lists Wade as CEO, Executive Vice President, and Director of BTW. Yet, the purported minutes of a BTW Board meeting held one day after the effective date of the Ownership Report show Wade elected to those positions during that meeting. Assuming the minutes are legitimate -- and again we agree with the ALJ that they appear not to be/48 -- they attempt to legitimize information that was represented to the Commission as already being true and thus further undermine the contention that, when Wade submitted the information, he did so in good faith.

25. Finally, the Wade Group disputes the ALJ's findings concerning BTW's by-laws and his conclusion that Wade's representation in a 1987 pleading that he executed the by-laws in 1981 constituted an additional instance of misrepresentation. I.D., at 86-87, 116. They claim that, as incorporator, Wade had the power to draft BTW's by-laws and no reason not to do so. They point out that the language of the by-laws tracks that of a 1985 Amendment to the Articles of Incorporation that was submitted to the Commission,/49 a fact they believe contradicts the ALJ's conclusion that the by-laws were prepared in 1987. They also again contend that the ALJ's adverse conclusion ignores contrary evidence in a letter from Wilson's attorney to the Board. But nothing the Wade Group argues lends support to their ultimate conclusion; i.e., that Wade in fact prepared the by-laws in 1981. Wade may have had the

authority to draft BTW's by-laws, but, as the ALJ correctly concluded, he had ample reason not to do so, see I.D. at 99-105; the fact that the purported by-laws track language in a 1985 Amendment that was returned by the Commission as procedurally defective does not establish whether the by-laws existed in 1981; and, as we have already concluded, the letter from Wilson's lawyer does not, as the Wade Group would have the Commission believe, concede that by-laws were presented to the Board in 1984. See note 38 supra. To the contrary, the evidence is overwhelming that no by-laws existed until long after all members of the original Board except Ware were ousted.

/43 See n.31, supra.

/44 Ware's testimony is very clear that, despite the representation in the application that it was prepared under her direction, she had no involvement in its preparation at all and assumed Wade and his staff "in Washington" put it together. Tr. at 954-965. Concerning authorization to file the application, the Wade Group correctly points out that Woodfork's and Campanella's testimony about whether they gave verbal authorization is ambiguous. See Tr. at 529; 1407. However, BTW's application specifically represents that they were part of a majority of Board members who gave written authorization for Ware to file the application, and Campanella's testimony on that point is clearly to the contrary. Tr. at 1407-1408. Likewise, Pate, whose name was also listed in the application as one who gave written authorization, clearly denied doing so. I.D. at 19.

/45 Mass Media Bureau Exhibit 3, a document entitled "Action of Organizer-Incorporator," indicates only that Wade could appoint interim officers and an initial slate of directors, whose terms would expire at "year end 1981."

/46 Woodfork denies that she authorized Stevens to sign the document for her. I.D. at 65.

/47 The Wade Group argues that the corporate resolution was "only cumulative" to previous "oral authorizations" for Wade to act as an officer of BTW. They contend that Ware and Woodfork authorized Wade as General Manager to do whatever was necessary to get the station operational, and that such authorization carried with it the right for Wade to hold himself out as an officer of BTW. However, the record shows that Woodfork did not intend to give him that right, and that she publicly rebuked Wade on at least one occasion for representing himself as an officer when he had not been so elected. I.D. at 58.

/48 I.D. at 68-69, 114.

/49 The Amendment was returned for procedural reasons.

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26. In addition to the misrepresentations concerning BTW's elusive by-laws and the misleading information in BTW's original application, subsequent applications, and haphazard Ownership Reports, the failure to file certain corporate documents as required by 47 C.F.R. 73.3613(b) further obscured the true nature of BTW from the Commission. I.D. at 11, 62, 72, 119, 120./50 Without reaching the question raised by the Wade Group of whether the section 73.3613(b) violations are sufficient in themselves to warrant revocation of BTW's permit, we conclude that the record evidence, taken as a whole, clearly and amply supports the ALJ's conclusion that the unauthorized transfer of control of BTW from the original Board to Wade was intentionally concealed from the Commission by Wade and that, absent mitigating circumstances, the BTW permit must therefore be revoked.

27. Woodfork argues in her Exceptions to the I.D. that

indeed mitigating circumstances exist; i.e., that she is one of the eight original directors to whom the permit was granted, that she did not actively or knowingly participate in Wade's usurpation of control over BTW, that she subsequently made "hurculean" efforts to bring Wade's unauthorized activities to the Commission's attention, and that therefore the permit should be awarded to her alone. While we strongly commend Woodfork's determination to see that neither Wade nor the Wade Group retains wrongful control of BTW, we also agree with the ALJ that Woodfork too must bear responsibility for the events that transpired. I.D. at 125-131./51 We do not find that Woodfork affirmatively worked to further Wade's plan./52 However, her utter passivity and willingless to be manipulated by Wade, even when his activities went far beyond the scope of what the Commission and directors had originally been told they would be, clearly facilitated Wade's efforts to exercise control over the 4 corporation. See, e.g., I.D. at 42, 52, 56, 59, 73, 74, 112, 115. Cf United Broadcasting Co. of Florida, Inc., 55 FCC 2d 832 (1975), recon. denied, 60 FCC 2d 816 (1976) (renewal denied based on licensee's abdication of responsibility).

28. We agree with Woodfork that the public interest would have been served by the initiation of a minority-controlled, minority-oriented noncommercial television station in Los Angeles. We also note Woodfork's assertion that, because of a freeze on the acceptance of new applications for television construction permits in Los Angeles, new filings from other applicants for permission to use reserved Channel 68 will not be accepted in the foreseeable future. However, even assuming that such a result will follow, it is fundamental that authority to use the frequency could be given to one of the parties now before us

only if the party were qualified to be a Commission licensee, and that is not the case. The group of eight directors to whom BTW's permit was entrusted, including Woodfork, completely abdicated their responsibilities, allowing Wade to take over the corporation for his own purposes with relatively little resistance. Nor does the Wade Group have any legitimate claim to hold BTW's permit. See 11-13 supra. Thus the ALJ correctly concluded that none of the parties to the proceeding has the requisite qualifications to be a Commission permittee and that the permit must be revoked./53

/50 Concerning the Wade Group's argument that the section 73.3613(b) violations are not relevant to its qualifications because there was no intent to deceive, see note 41 supra. The Wade Group also contends that the ALJ erred when he found that BTW was required to file a "Financing Statement" between BTW and lender Harold Ricks because the document evidenced that Ricks had a possible future interest in BTW. I.D. at 120; Mass Media Exhibit 20. We agree with the ALJ that the use of BTW's assets, including FCC permits, as security for a loan did in fact give Ricks a possible future interest in such authorizations and therefore the Ricks/BTW agreement should have been filed with the Commission. We further note that such security interests have been found impermissible. See Kirk Merkley, 94 FCC 2d 829, 830 (1983).

/51 Citing a separate statement by Member Blumenthal in Mark A. Perry, 4 FCC Rcd 6500, 6505 (Rev. Bd. 1989), Woodfork contends that her conduct should be excused because she was merely following the lead of a "respected attorney." However, Member Blumenthal's comment represents an exception to the general rule that the attorney

is the client's agent and the client thus cannot escape responsibility for the inappropriate action or inaction of his attorney. See e.g., id. at 6502-6503 and cases cited therein.

/52 Woodfork's Exceptions complain that the ALJ wrongly found that she "knowingly" or "actively" aided Wade in his impermissible activities. We do not share this interpretation of the I.D., but if in fact it might be read to imply that Woodfork approved and affirmatively worked to further Wade's scheme, we agree that no such implication is warranted.

/53 The Wade Group claims that the BTW permit cannot be revoked because the corporate entity was not named as a party in the HDO. However, on its face the HDO Orders BTW to show cause at hearing why its permit should not be revoked. HDO at 3. The Wade Group also argues that the ALJ precluded BTW from having "counsel to appeal" revocation of its permit when he concluded that Yelverton does not represent the corporate entity, see note 2 supra. In fact, BTW as a legitimate corporate permittee approved by the Commission no longer exists. See 13 supra. However, the interest of each faction now claiming the right to hold the BTW permit -- Woodfork on the one hand and the Wade Group on the other -- has been adequately represented here by counsel.

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29. ACCORDINGLY, IT IS ORDERED, That the Exceptions to Initial Decision, 7 FCC Rcd 7819 (1992), filed on January 4, 1993 by Booker T. Wade, Jr., Rosa Ware, Gwendolyn May, and Hope Smith Bynum ARE GRANTED to the extent indicated herein and otherwise ARE DENIED.

30. IT IS FURTHER ORDERED, That the Consolidated Partial Exceptions to Initial Decision, 7 FCC Rcd 7819

(1992), filed on January 4, 1993 by Mary V. Woodfork ARE GRANTED to the extent indicated herein and otherwise ARE DENIED.

31. IT IS FURTHER ORDERED, That Initial Decision, 7 FCC Rcd 7819 (1992) IS AFFIRMED, and the construction permit for Noncommercial Educational Television Station KEEF-TV, Los Angeles, California, held by Black Television Workshop of Los Angeles, Inc. (File No. BPET-811118KF) IS REVOKED.

32. IT IS FURTHER ORDERED, That the Applications of Black Television Workshop of Los Angeles, Inc. for license to cover construction permit (File No. BLET-870225KE), for consent to modify construction permit (File No. BMPCT-870610KU), for license to cover construction permit (File No. BLET-870610KT), and for special temporary authority ARE DISMISSED.

33. IT IS FURTHER ORDERED, That the Notice of Appearance filed by Stephen T. Yelverton on November 30, 1992 IS DISMISSED as moot.

34. IT IS FURTHER ORDERED, That the Petition for Reconsideration of Memorandum Opinion and Order, 7 FCC Rcd 6868 (1992), filed on November 30, 1992 by Booker T. Wade, Jr., Rosa Ware, Gwendolyn May, and Hope Smith Bynum IS DENIED.

35. IT IS FURTHER ORDERED, That the Motion to Strike Comments of Mary V. Woodfork filed on December 22, 1992 by Booker T. Wade, Jr., Rosa Ware, Gwendolyn May, and Hope Smith Bynum IS DISMISSED as moot.

36. IT IS FURTHER ORDERED, That the Notice of Special Appearance and Motion to Stay filed on January 8, 1993 by Booker T. Wade, Jr. IS DISMISSED as moot.

37. IT IS FURTHER ORDERED, That the Petition for Reconsideration of Order, FCC 921-094, filed on January

14, 1993 by Booker T. Wade, Jr., Rosa Ware, Gwendolyn May, and Hope Smith Bynum IS DENIED.

38. IT IS FURTHER ORDERED, That the Request for Oral Argument filed on January 25, 1993 by Mary V. Woodfork IS DENIED.

39. IT IS FURTHER ORDERED, That the Motion to Dismiss Petition for Reconsideration filed on January 27, 1993 and the Motion for Leave to File a Reply Pleading filed on February 3, 1993 by Mary V. Woodfork ARE DISMISSED as moot.

40. IT IS FURTHER ORDERED, That the Request for Oral Argument filed on January 28, 1993 by Booker T. Wade, Jr., Rosa Ware, Gwendolyn May, and Hope Smith Bynum IS DENIED.

41. IT IS FURTHER ORDERED, That the Request to Strike Request for Oral Argument filed on January 29, 1993 by Mary V. Woodfork IS DISMISSED as moot.

42. IT IS FURTHER ORDERED, That the Motion to Dismiss Request for Oral Argument filed February 3, 1993 by the Mass Media Bureau IS DISMISSED as moot.

43. IT IS FURTHER ORDERED, That the Motion to Strike Opposition to Motion to Strike, filed February 1, 1993 by Booker T. Wade, Jr., Rosa Ware, Gwendolyn May, and Hope Smith Bynum IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX C, FCC 93-528, rel. December 14, 1993
8 FCC Rcd 8719 (1993)

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC.

MEMORANDUM OPINION AND ORDER

By the Commission:

1. In Decision, 8 FCC Rcd 4192 (1993), we upheld the Initial Decision (I.D.) of Administrative Law Judge Joseph Chachkin (ALJ), which revoked the permit of Black Television Workshop (BTW) to construct a non-commercial UHF television station to serve the Los Angeles, California area./1 By this action we deny Petitions for Reconsideration of the Decision filed on behalf of Booker T. Wade, Jr., Rosa Ware, Gwendolyn May, and Hope Smith Bynum (the "Wade Group") and on behalf of Mary V. Woodfork ("Woodfork")./2 By this action we also deny the Wade Group's Petition to Dismiss Woodfork as a party to this proceeding and dismiss as moot its Petition to Dismiss Titilola Payne Parker, Clint Wilson. Roy Campanella, Jr.,Gary Cordell, Linda Pate, and Jerome Duncan as parties to this proceeding./3

/1 7 FCC Rcd 7819 (1992). We had previously ordered that Exceptions to the I.D. be submitted to the Commission, not the Review Board, in order to expedite the proceeding to the greatest extent possible consistent with due process. 7 FCC Rcd 2716, 2717 (1992).

/2 The Petitions for Reconsideration were filed on July 23, 1993. On August 2, 1993 Woodfork opposed the Wade

Group's Petition for Reconsideration and the Mass Media Bureau (MMB) filed a Consolidated Opposition to both the Wade Group's and Woodfork's Petition. The Wade Group filed an Opposition to Woodfork's Petition for Reconsideration on August 5, 1993. Woodfork and the Wade Group filed Replies to the Oppositions on August 12. On August 30 the MMB filed a Motion for Leave to File a Response and a Response to the Wade Group's Reply, arguing that the Wade Group's Reply unfairly called for sanctions against the MMB for making "frivolous contentions." On September 9 the Wade Group opposed the MMB's Motion. In light of our resolution of this proceeding, we are denying the MMB's Motion for Leave to File a Response, noting, however, that the MMB's contention which provoked the Wade Group's attack is in fact legally correct. See note 6 infra.

/3 The Wade Group filed the Petition to Dismiss Woodfork on August 5, 1993. the MMB and Woodfork opposed the Petition on August 11 and August 12 respectively, and the Wade Group filed a Reply to the Oppositions on August 23, 1993. The Wade Group filed the Petition to Dismiss the other six named members of the original BTW board on August 23, 1993, the MMB opposed the Petition on August 30, 1993, and the Wade Group flled a Reply to the Opposition on September 9, 1993.

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2. The Wade Group's Petition to Dismiss Woodfork argues that the I.D. in this matter disqualified Woodfork as a permittee of the proposed Los Angeles station because she "fraudulently signed" a BTW ownership report submitted to the Commission. The Wade Group contends that Woodfork failed to file an Exception to that portion of the I.D. and that the matter is therefore a "final non-appealable

determination" requiring the dismissal of Woodfork as a party. There is no merit to this argument. Though Woodfork has not denied that, pursuant to directions from Booker Wade, BTW's attorney, she once signed a BTW ownership report in blank, that action was not solely responsible for her disqualification./4 Nor can her failure to recant that single action in Exceptions serve now as grounds for her disqualification, especially in light of the fact that she clearly preserved her right to continue participating in this proceeding by filing extensive Exceptions to many other aspects of the I.D. and by filing the instant Petition for Reconsideration.

3. The I.D. also found all other members of BTW's original board unqualified to be Commission permittees of the Los Angeles allocation. The Wade Group has filed a separate Petition to Dismiss six of those members as parties to this proceeding. Unlike Woodfork, the named individuals have not exercised their rights to protest their disqualification at either the agency or judicial level. The Decision is therefore final as to their interests and the Wade Groups Petition to Dismiss them as parties is dismissed as moot./5 /6

/4 Woodfork was disqualified for breaching her corporate duty to BTW by repeatedly permitting Wade to manipulate her. I.D. at 7834 127. However, the I.D. places ultimate responsibility for the false ownership report to which the Wade Group now refers on Wade himself. Specifically, it states that, while Woodfork "indirectly participated in a fraud upon the Commission" by signing the blank form, Wade "ultimately must be held accountable for the misrepresentations made ..., since Wade alone filed the Ownership Report containing information which he knew to

be false." I.D. at 7832 112.

/5 Pursuant to 47 U.S.C. 402 and 405 respectively, the six parties had the right to file a judicial appeal of the decision disqualifying them as permittees and revoking the BTW permit or to petition for reconsideration of the matter by the Commission within thirty days of public notice of the decision, or by July 23, 1993. In addition to their failure to exercise those rights, they failed to respond to the Wade Group's Petition to Dismiss.

/6 Nonetheless, and contrary to the Wade Group's arguments, the MMB correctly points out that all parties should have served a copy of their Petitions for Reconsideration on the six original directors. 47 C.F.R. 1.211. Section 1.276(f) of the Commission's rules, cited by the Wade Group to excuse its failure, applies on its face to comparative application proceedings rather than revocation proceedings. In any event, it leaves the dismissal of parties under the circumstances described therein to the discretion of the Commission, not other parties. In light of the fact that the six named individuals have otherwise declined to exercise their rights in this proceeding, as described in note 5 supra, we conclude that the Wade Group's failure to serve copies of its Petition for Reconsideration on those individuals renders the Petition procedurally deficient but not, as the MMB argues, so flawed as to warrant no further consideration.

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4. We turn now to the Petitions for Reconsideration filed by Woodfork and the Wade Group. Woodfork's Petition is based on arguments that were presented in her Exceptions to the I.D. and have already been carefully considered by the Commission. Reconsideration will not be granted to debate those matters again. WWIZ, Inc., 37 FCC 685 (1964), aff'd sub nom., Lorain Journal Co. v. FCC, 351

2d 824 (D.C. Cir. 1965), cert. denied, 383 U.S. 967 (1966)./7 In most instances, the Wade Group's arguments are also arguments that the Commission has already considered and we will not do so again. WWIZ, supra, 37 FCC 685./8 In two other instances, though the arguments are new, the facts underlying the arguments were readily available when the Wade Group filed its Exceptions to the I.D., and they provide no public interest basis for reconsideration. Therefore, those arguments. likewise, warrant no relief. See 47 C.F.R. 1.106 (c) (reconsideration will be granted on the basis of facts not previously presented to the Commissiononly if the facts relate to events that have occurred orcircumstances that have changed since the last opportunItyto present such matters or if the public interest requires consideration of the facts)./9

/7 The essence of Woodfork's argument is that she had no reason to doubt the integrity of Wade, a respected attorney and former assistant to an FCC Commissioner. She claims that she consistently tried to participate in BTW's affairs, that to the extent Wade took actions which could reasonably be interpreted as inappropriate vis-a-vis his legitimate role at BTW, she challenged him, and that, but for her efforts, Wade's misconduct would not have come to the attention of the Commission. Thus, she contends, she should be absolved from responsibility for the transfer of control of BTW, the BTW permit should be reinstated, and she should be declared the sole permittee, a result which would serve the public interest in several ways. These were the exact arguments raised in her Exceptions and rejected because of the clear record evidence that Woodfork's willingness to be manipulated by Wade, both before and after other BTW Directors recognized that his actions were not in BTW's best

interest, facilitated Wade's take-over. See, e.g., I.D. at 7826 52-54 and 7834 130. Woodfork now argues that the Commission's assessment of her role in crucial disagreement" with and harsher than that of the ALJ. In fact, both the ALJ and Commission recognized that Woodfork is due credit for her actions in bringing the BTW matter before the Commission, but that she must bear responsibility for her failure to properly exercise the corporate authority with which she had been vested. See, e.g., I.D. at 2834 131; DecIsion at 4198 20 and 4200 28. Woodfork's reliance on individual phrases from the I.D. and Decision does nothing to change this ultimate conclusion.

/8 For example, the Commission has already considered, inter alia, the Wade Group's arguments that the ALJ's decision wrongfully stripped BTW of its right to counsel (Decision at note 53); that no sanctions can be imposed against BTW because it was not named in the Hearing Designation Order (Decision at note 53); that the MMB engaged in unfair trial tactics because it failed to depose or call as witnesses certain individuals who would have confirmed the Wade Group's version of events and that the burden of proof and burden of proceeding with the evidence therefore fell unfairly on the Wade Group (Decision at note 19); that events occurring prior to grant of the BTW permit could not be properly considered in determining whether to revoke the BTW permit (Decision at 31); that the Commission cannot conclude that an unauthorized transfer of control of BTW occurred because it has no articulated policy concerning transfers of control of non-stock entities (Decision at 13); that the evidence fails to support the conclusion that there was an intent to deceive the Commission concerning the transfer of control of BTW (Decision at note 41); that May and Bynum are legitimate BTW directors (Decision at

12); that the evidence supports the conclusion that BTW by-laws existed as early as May 1984 (Decision at 16, 25); that the evidence fails to support the conclusion that various BTW filings at the Commission contained misrepresentations and/or lacked candor (Decision at 21-26); that the testimony of various witnesses must be disregarded because it was biased or inconsistent (Decision at 14); that the evidence fails to support the conclusion that certain documents were fabricated (Decision at 24); that the conclusion that certain other BTW documents should have been filed with the Commission and were not is erroneous (Decision at n.50); and that Wade had no motive to control BTW and in fact did not control BTW except to the extent permitted by his roles as officer and director, positions to which he was legitimately elected (Decision at 14-20, 24).

/9 The Wade Group argues that the Hearing Designation Order (HDO) was too general to be legally sufficient and that, pursuant to the statute of limitations, consideration should be barred of any alleged misconduct except that which occurred during the one year preceding the issuance of the HDO. The Wade Group has been on notice as to both of these arguments since 1988, when the HDO was issued, but it failed to raise either of them in its exceptions to the Initial Decision. We do not believe that the public interest would be served by considering them for the first time now, especially considering the lengthy history of this proceeding and our earlier determination that it must now be expedited. See 47 C.F.R. 1.277(a) and note 1, supra. However, concerning the statute of limitations argument, we note that 47 U.S.C. 503 (b)(6)(B), cited as authority for the proposition that revocation should not be based on conduct occurring more than one year before issuance of the HDO, is inapposite in this proceeding. Revocation proceedings are

governed by 47 U.S.C. 312, which does not include a statute of limitations provision. New West Broadcasting Systems, inc., 8 FCC Rcd 102 (MMB 1993), also cited by the Wade Group in support of its contention, is likewise inapposite, since that case concerned imposition of a monetary forfeiture, not revocation.

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5. As to the remaining Wade Group arguments. we conclude that they are without merit. Specifically, the Wade Group argues that the decision in this proceeding is in conflict with two other recent Commission decisions and that it is racially discriminatory. It contends that in Dixie Broadcasting, Inc., 8 FCC Rcd 4386 (1993), and in Fox Television Stations, Inc., 8 FCC Rcd 5341(1993), the Commission applied more lenient standards to white broadcasters than it did in this proceeding, where several of the parties are black./10 We note initially that Dixie Broadcasting is an ALJ's initial Decision, not a Commission decision, and thus it is not binding Commission precedent. Western Communications, Inc., 59 FCC 2d 1411, 1446 n.9 (1976), citing Finalization of Initial Decision, 20 RR 1411 (1961). In any event, the facts as set forth both in Dixie Broadcasting and Fox Television are completely different from those here, and for that reason -- not because of any reason related to race -- the results were different./11 Thus the cited cases, like all other arguments raised by Woodfork and Wade, fail to demonstrate that reconsideration would be appropriate./12

/10 The Wade Group makes the related argument that the Commission's conclusion that Rosa Ware, one member of the Wade Group, did not act independently from her brother Booker Wade, another member of the Group, raises

questions of gender and racial stereotyping because it assumes a black female is readily manipulated. However, the record overwhelmingly and objectively supports the conclusion that Ware was under Wade's control. Decision at 20.

/11 Specifically, though in Dixie Broadcasting the ALJ held that the licensee's misconduct was "serious," the ALJ found no "deliberate intent to mislead or deceive the Commission." Dixie Broadcasting at 4403 127. Likewise, in Fox Broadcasting, though representations made to the Commission were found to be "potentially misleading" and "intemperate," they were "technically accurate" and "did not materially distort the facts." 8 FCC Rcd at 5356 67-70. Here, on the other hand, we agreed with the ALJ that "the record was replete" with evidence of misrepresentations and lack of candor, Decision at 25, and the Wade Group's arguments that the relevant information was submitted to the Commission in good faith was contradicted repeatedly. Further, members of the Wade Group, unlike the permittee in Dixie Broadcasting, not only failed to cooperate in the investigation and hearing, but also made considerable effort to defeat it. See Decision at note 20.

/12 On November 1, 1993 The National Association of Black Owned Broadcasters, Inc. (NABOB), filed Comments urging that the interests of the Los Angeles African American community in a minority controlled public television station warrant a result here like that reached in Silver Star Communications-Albany, Inc., 6 FCC Rcd 6905(1991), where a $20,000 forfeiture was imposed on the licensee, NABOB has not shown an interest in this proceeding to support a claim of standing. See Coalition for the Preservation of Hispanic Broadcasting v. FCC, 931 F.2d 73 (D.C. Cir. 1991) (en banc), cert. denied 112 S. Ct.

298 (1991). In any event, in contrast to the present proceeding, Silver Star was a case in which there was no finding of deception on the part of the licensee. In light of this determination, the MMB's November 8, 1993 Motion to Dismiss NABOB's Comments, its November 22, 1993 Erratum and the Wade Group's Opposition are moot.

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6. ACCORDINGLY, IT IS ORDERED, That the July 23. 1993 Petition for Reconsideration filed on behalf of Mary V. Woodfork IS DENIED.

7. IT IS FURTHER ORDERED, That the July 23, 1993 Petition for Reconsideration filed on behalf of Booker T. Wade, Jr.. Rosa Ware, Gwendolyn May, and Hope Smith Bynum IS DENIED.

8. IT IS FURTHER ORDERED, That the Mass Media Bureau's August 30. 1993 Motion for Leave to File a Response to the Wade Group's Reply to Oppositions to the Petition for Reconsideration IS DENIED.

9. IT IS FURTHER ORDERED. That the Wade Group's August 5, 1993 Petition to Dismiss Mary V. Woodfork IS DENIED.

10. IT IS FURTHER ORDERED, That the Wade Group's August 23, 1993 Petition to Dismiss Titilola Payne Parker. Clint Wilson, Roy Campanella, Jr.. Gary Cordell, Linda Pate, and Jerome Duncan IS DISMISSED as moot.

11. IT IS FURTHER ORDERED, That the Motion to Dismiss filed November 8, 1993 by the Mass Media Bureau IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION
William F. Caton
Acting Secretary

APPENDIX D, FCC 94I-013, rel. February 15, 1994

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC.

ORDER

1. This order dismisses as repetitious a Petition for Reconsideration, filed January 13, 1994, by Booker T. Wade, Jr., Rosa Ware, Gwendolyn May, and Hope Smith Bynum (the Wade Group), which seeks reconsideration of Commission Memorandum Opinion and Order, FCC 93-528 (Dec. 14, 1993). /1 That order denied reconsideration of a Decision which revoked the construction permit of Black Television Workshop (BTW) for non-commercial educational station KEEF-TV, Los Angeles, California. Black Television Workshop of Los Angeles, Inc., 8 FCC Rcd 4192 (1993). See also Black Television Workshop of Los Angeles, Inc., 7 FCC Rcd 7819 (I.D. 1992). Members of the Wade Group are individual parties to this proceeding and claim to be the current directors of BTW.

I. BACKGROUND

2. The Commission revoked BTW's construction permit based on its finding that control of BTW was transferred without authorization in violation of 47 U.S.C. 310(d) and that the unlawful transfer was accompanied by

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1/ Before the Commission are: (1) an opposition, filed January 24, 1994, by Mary V. Woodfork, and a reply, filed February 7, 1994, by the Wade Group; and (2) a Motion to Dismiss, filed January 24, 1994, by the Mass Media Bureau, and an opposition filed January 28, 1994, by the Wade Group.

misrepresentations and lack of candor. 8 FCC Rcd 4200 26. According to the Commission, permission was not sought for the replacement of BTW's original eight-member board of directors by other individuals. Id. at 4196 12. Moreover, the Commission found that, at relevant times, actual control of BTW resided in Wade and not in BTW's nominal directors. Id. at 4197 14. The Commission also found numerous instances in which documents filed with the Commission contained misrepresentations and lacked candor as to who controlled BTW. Id. at 4198-99 21.

II. PETITION

3. The Wade Group contends that the Commission ignored evidence undercutting the conclusion that disqualifying misconduct occurred. The Wade Group claims that the Commission erred in relying on testimony adverse to Wade by former director, Mary V. Woodfork, because Woodfork subsequently revised and recanted her testimony in exceptions to the Commission. Additionally, the Wade Group claims that the testimony of Woodfork and of two other former directors, Roy Campanella, Jr. and Clint Wilson, should be rejected as biased by their own interest in obtaining the broadcast facility. The Wade Group characterizes Campanella's testimony as uncorroborated opinion.

4. Furthermore, the Wade Group asserts that the Commission had no basis to find that its members, Ware, May, and Bynum were personally unqualified to be Commission licensees. According to the Wade Group, there is no evidence that these individuals made misrepresentations or lacked candor and no evidence that the participation of May and Bynum (who were not original directors) was concealed from the Commission.

5. As an additional matter, the Wade Group faults the

Commission's Memorandum Opinion and Order both for rejecting the Group's argument that information about BTW was submitted in good faith and for indicating that members of the Wade Group failed to cooperate in the investigation and at the hearing.

6. Woodfork and the Mass Media Bureau respond that the Wade Group's Petition for Reconsideration should be dismissed as repetitious.

III. DISCUSSION

7. The Wade Group's petition falls within the provisions of 47 C.F.R. 1.106(k) (3), which state that: " A petition for reconsideration of an order which has been previously denied on reconsideration may be dismissed by the staff as repetitious." The petition now before the Commission is repetitious under the rule, since it seeks reconsideration of an order which itself denied the Wade Group's previous petition for reconsideration of the Commission's decision revoking BTW's construction permit.

8. Moreover, the current petition is devoted to matters which the Commission addressed in its decision and which have already been subject to reconsideration. These include: (1) the argument that the testimony of Woodfork, Campanella, and Wilson should not be relied on (8 FCC Rcd at 4194-95 9, 4197 16); (2) the Commission's evaluation of Woodfork's "revised and recanted" testimony (Id. at 4200 27); and (3) the point that all of BTW's directors, including the Wade Group, abdicated their responsibilities and are therefore culpable for the disqualifying misconduct that occurred (Id. at 4200 28) . The Commission noted that it would not reconsider such matters upon which it already deliberated. FCC 93-528 at 4, citing, WWIZ Inc., 37 FCC 685, 686 2 (1964), aff'd sub nom. Lorain Journal Co. v. FCC, 351 F.2d 824 (D.C. Cir. 1965), cert. denied,

383 U.S. 967 (1966).

9. Similarly, in its decision, the Commission concluded that the BTW construction permit should be revoked because the unauthorized transfer of control was accompanied by misrepresentation and lack of candor. 8 FCC Rcd at 4198-200 21-26. In response to the Wade Group's first petition for reconsideration, the Commission observed that this factor distinguishes this case from cases in which applicants were not found to be disqualified. FCC 93-528 5, n.11. The present petition for reconsideration merely challenges collateral aspects of the Commission's distinctions.

IV. ORDERS

10. ACCORDINGLY. IT IS ORDERED, Pursuant to the authority delegated under 47 C.F.R. 0.251(f) (3), that the Motion to Dismiss, filed January 24, 1994, by the Mass Media Bureau IS GRANTED, and the Petition for Reconsideration, filed January 13, 1994, by Booker T. Wade, Jr., Rosa Ware, Gwendolyn May, and Hope Smith Bynum, IS DISMISSED as repetitious.

William E. Kennard
General Counsel

By John I. Riffer
Associate General Counsel

APPENDIX E, FCC 94-220, rel. September 1, 1994
9 FCC Rcd 4477

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC.

ORDER

By the Commission:

1. This order denies an Application for Review, filed March 7. 1994. by Booker T. Wade. Jr.. Rosa Ware. Gwendolyn May, and Hope Smith Bynum (the Wade Group). which seeks review of an order by the General Counsel dismissing as repetitious a petition for reconsideration filed by the Wade Group. Black Television "Workshop of Los Angeles, inc., FCC 94I-013 (Feb. 15, 1994)./1 The Wade Group sought reconsideration of a Commission memorandum opinion and order which denied reconsideration of a decision which revoked the construction permit of Black Television Workshop of Los Angeles. Inc. (BTW) for station KEEF-TV. Los Angeles, California. Black Television Workshop of Los Angeles, Inc., 8 FCC Rcd 4192 (1993). recon. denied, 8 FCC Rcd 8719 (1993).

2. IT IS ORDERED. That, pursuant to 47 C.F.R. 1.115(g), the Application for Review, filed March 7, 1994, by Booker T. Wade. Jr., Rosa Ware, Gwendolyn May, and Hope Smith Bynum IS DENIED./2

/1 Also before the Commission are oppositions. filed March 14, 1994, by the Mass Media Bureau. and March 15. 1994 by Mary V. Woodfork.

/2 In view of the Wade Group's continued assertion of previously raised contentions, we note that there must be some finality to the administrative process, or else we would be involved in a never-ending process of review that would frustrate our ability to conduct our business in an orderly fashion. See Warren Price Communications, Inc., 7 FCC Rcd 6850, n.1 (1992).

FEDERAL COMMUNICATIONS COMMISSION

APPENDIX F, HEARING DESIGNATION ORDER,
3 FCC Rcd 5443 (Sept. 12, 1988)

BLACK TELEVISION WORKSHOP OF
LOS ANGELES, INC.

ORDER TO SHOW CAUSE
HEARING DESIGNATION ORDER AND
NOTICE OF APPARENT LIABILITY

1. The Commission has before it for consideration: (a) the construction permit of Black Television Workshop of Los Angeles, Inc. (BTW), for noncommercial educational television station KEEF-TV, Los Angeles, California; (b) the four applications captioned above; (c) various pleadings submitted by Mary Woodfork, et al., informally objecting to the grant of said applications, and by Booker T. Wade, Jr., et al., opposing such objections; (d) the results of a preliminary investigation into various allegations of wrongdoing; and (e) comments and other materials filed on behalf of Coast Community Television and Radio Telecom and Technology, Inc., whose business interests are affected by the disposition of this matter.

2. The information brought to the attention of the Commission as a result of a dispute between Mary Woodfork, et al., and Booker T. Wade, Jr., et al., over control of BTW, raises substantial and material questions as to whether the permittee, under the control of either faction, possesses the requisite qualifications to be or remain a permittee of the captioned station and whether the public interest, convenience and necessity would be served by grant of any of the captioned

applications. If substantiated, the information could warrant revocation of the construction permit[1] or denial of the subject applications.[2]

3. Accordingly, IT IS ORDERED, That pursuant to Section 312(a) of the Communications Act of 1934, as amended, Black Television Workshop of Los Angeles, Inc., IS DIRECTED TO SHOW CAUSE why the permit of KEEF-TV, Los Angeles, California, should not be REVOKED, at a hearing to be held at a time and place specified in a subsequent Order, upon the following issues:

(a) To determine whether control of the permittee corporation (BTW) was transferred without Commission approval, or exercised by persons not authorized to do so, in violation of Section 310(d) of the Communications Act; and, if so, whether such unauthorized control was due to the feasance, malfeasance, misfeasance, or nonfeasance (including but not limited to those actions mentioned in items (b) and (c) below) of the original eight directors,[3] or any of them, constituting BTW's board in 1983; the group of four directors,[4] or any of them, claiming to control BTW now; or any other persons or groups presently or formerly associated with BTW.

(b) To determine whether any of the aforementioned persons made misrepresentations to the Commission, were lacking in candor in their dealings with the Commission, or attempted to mislead or deceive the Commission as to the true ownership and control of the permittee in BTW's original permit application and related documents in the subsequent above-captioned applications, in Ownership Reports filed with the Commission, and in pleadings filed with the Commission with respect to the past and current control of BTW.

(c) To determine whether any of the aforementioned persons

violated Section 73.3613(b) of the Commission's rules by failing to file the organizational documents required thereunder, including articles of incorporation and bylaws and any amendments thereto, and by failing to report any agreements or understandings affecting ownership and control of the permittee.

(d) To determine, in light of the evidence adduced under the foregoing issues, whether any of the persons or groups named above possesses the requisite qualifications to be or remain a permittee of the captioned television station.

(e) If, in light of the evidence adduced pursuant to the foregoing issues, it is determined that revocation of the permit for station KEEF-TV, Los Angeles, CA, is not warranted, to determine, pursuant to Section 309(e) of the Communications Act, whether grant of the captioned applications, or any of them, will serve the public interest, convenience, and necessity.

4. IT IS FURTHER ORDERED, That the Chief, Mass Media Bureau, is directed to serve upon Black Television Workshop of Los Angeles, Inc. (through the parties named in paragraph 11 below), within thirty (30) days of the release of this Order, a Bill of Particulars with respect to Issues (a) through (c) above.

5 . IT IS FURTHER ORDERED, That pursuant to Section 312(d) of the Communications Act of 1934, as amended, both the burden of proceeding with the evidence and the burden of proof shall be upon the Mass Media Bureau as to issues (a) through (d), inclusive.

6. IT IS FURTHER ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, both the burden of proceeding with the introduction of evidence and burden of proof with respect to issue (e), shall be upon Black Television Workshop of Los

Angeles, Inc.

7. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the parties, pursuant to Section 1.91(c) of the Commission's rules, in person or by attorney, shall file with the Commission within thirty (30) days of the receipt of the Order to Show Cause a written appearance stating that they will appear at the hearing and present evidence on the matters specified in the Order. If a party fails to file an
appearance within the time specified, the right of that party to a hearing shall be deemed to have been waived. *See* Section 1.92(a) of the Commission's rules. Where a hearing is waived, a written statement in mitigation or justification may be submitted within thirty (30) days of the receipt of the Order to Show Cause. *See* Section 1.92(a) of the Commission's rules. In the event the right to a hearing is waived by all the parties to this proceeding, the presiding officer, or the Chief Administrative Low Judge if no presiding officer has been designated, will terminate the hearing proceeding and certify the case to the Commission in the regular course of business and an appropriate order will be entered. *See* Section 1.92(c) of the Commission's rules.

8. IT IS FURTHER ORDERED, That if it is determined that the hearing record does not warrant an Order revoking the permit of Black Television Workshop of Los Angeles, Inc., for station KEEF-TV, it shall also be determined if the permittee has willfully or repeatedly violated Section 310(d) of the Communications Act of 1934, as amended, or Section 73.3613(b) of the Commission's rules. If so, it shall also be determined whether an Order for Forfeiture shall be issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, in an amount up to $20,000 for the willful or repeated violation of said rules

and statutes.

9. IT IS FURTHER ORDERED, That this document constitutes a Notice of Apparent Liability for forfeiture for violation of Section 310(d) of the Communications Act of 1934, as amended, and Section 73.3613(b) of the Commission's rules. The Commission has determined that, in every case designated for hearing involving revocation of permits or denial of license applications, for alleged violations which also come within the purview of Section 503(b) of the Communications Act of 1934, as amended, it shall, as a matter of course, include this forfeiture notice so as to maintain the fullest possible flexibility of action. Since the procedure is thus a routine or standard one, we stress that the inclusion of this notice is not to be taken as in any way indicating what the initial or final disposition of the case should be; that judgment is, of course, to be made on the facts of each case.

10. IT IS FURTHER ORDERED, That, in light of the interest in keeping the station operational during the pendency of this proceeding, we hereby grant special temporary authority[5] for the station to operate substantially in accordance with the representations made in BTW's application for construction permit and pursuant to the technical modifications proposed in BMPCT-870610KU. KEEF-TV's silence has deprived the Los Angeles community of noncommercial educational television programming intended to meet the needs of its minority populations. Accordingly, we believe the public interest requires such temporary operations. This action does not represent any Commission predisposition toward the outcome of this case but merely allows temporary restoration of service by, or under the supervision of, the group whose control of BTW has already been passed upon and approved in a comparative

proceeding, to wit: Mary Woodfork, Clint Wilson, Gary Cordell, Roy Campanella, Jr., Linda Pate, Titilola Payne Parker, Jerrome Duncan, and Rosa Ware. The station is to be operated in accordance with the rules and statutes applicable to noncommercial educational television licensee. Bylaws and other rules governing the interactions and decision-making procedures of the aforementioned members of the controlling body shall be submitted to the Mass Media Bureau within twenty (20) days of the release of this Order.

11. IT IS FURTHER ORDERED, That the following persons be made parties to this proceeding, and further, That the Secretary send a copy of this Order by *Certified Mail - Return Receipt Requested*, to:

Mary Woodfork, Clint Wilson, and Gary Cordell
c/o Daniel J. Simms, Esq.
Arena Tower II, Suite 1040
7324 Southwest Freeway
Houston, 77074
Roy Campanella, Jr.
422 S. Rexford Drive
Beverly Hills, CA 90212
Linda Pate
433 N. Palm Drive
Beverly Hills, CA 90210
Titilola Payne Parker
4801 W. 96th St.
Inglewood, CA 90301-3637
Jerrome Duncan
Grant & Duncan
300 S. Grand Ave., 28th Floor
Los Angeles, CA 90071
Booker T. Wade, Jr., Rosa Ware,
Gwendolyn May, and Hope S. Smith

c/o Stephen T. Yelverton, Esq.
Maupin Taylor Ellis & Adams P.A.
3201 Glenwood Avenue
Raleigh, NC 27612

FOOTNOTES

1/ Section 312(a)(1) of the Communications Act of 1934, as amended, states that "[t]he Commission may revoke any station license or construction permit ... for false statements knowingly made ... in the application." Section 312(a)(2) permits the Commission to revoke a construction permit "because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application." Section 312(a)(4) permits revocation for willful or repeated violation of, or failure to observe, any provision of the Act or the Commission's Rules.

2/ Section 309(e) of the Communications Act of 1934, as amended, states that a formal hearing designation is appropriate if a substantial and material question of fact exists with respect to any such applications or if the Commission for any reason is unable to make the finding that the public interest, convenience, and necessity will be served by granting such applications.

3/ Mary Woodfork, Clint Wilson, Gary Cordell, Roy Campanella, Jr., Linda Pate, Titilola Payne Parker, Jerrome Duncan, and Rosa Ware.

4/ Booker T. Wade, Jr., Rosa Ware, Gwendolyn May, and Hope S. Smith.

5/ Such temporary operation is authorized for an initial period of 180 days and may be extended for additional periods. 47 U.S.C. § 309(f), 47 C.F.R. § §73.1635.

APPENDIX G,
BILL OF PARTICULARS, OCTOBER 11, 1988

To: Black Television Workshop of Los Angeles, Inc.

BILL OF PARTICULARS

Issues (a), (b), and (c) of the Commission's Order to Show Cause, Hearing Designation Order, and Notice of Apparent Liability, FCC 88-280, released September 12, 1988, in the above-captioned proceeding are based on the following information and allegations:

1. Booker T. Wade, Jr. (Wade), conceived of the idea of applying for a new noncommercial television station on Channel 68, Los Angeles, California. To that end, Wade, an attorney, formed the applicant Black Television Workshop of Los Angeles, Inc. (Workshop), incorporated it at his sole expense, chose its eight-member board of directors, filed its application with the Commission on November 18, 1981, and represented it at a comparative hearing in 1982. After Workshop was granted a construction permit on April 15, 1983, Wade ostensibly represented Workshop immediately thereafter only as its communications counsel.

2. Workshop was required by Section 73.3615(e) of the Rules to file an ownership report by May 15, 1983. Requests from the Commission for such report were ignored by Workshop until Wade caused such a report to be filed on March 8, 1985. The information on this report reflected Workshop's composition "as of April 30, 1983." In view of this time lag and two other tardy filings which did not comply with Section 73.3615(f) of the Rules--e.g., a March 18, 1985, ownership report

which reported information "as of January 14, 1985," and an April 1, 1987, report which reported information "as of November 18, 1985"--at no time did Workshop's ownership filings reflect the current relevant information required by the Commission regarding control of the permittee.

3. Sometime before November 23, 1987, Wade composed a set of Workshop "by-laws" that provided for the staggered expiration of Workshop's eight directors' terms, over a period from 1981 to 1987. With the exception of one director--Rosa Ware, Wade's sister--the other seven directors never saw these by-laws, or knew that any of their terms would expire as provided therein. Wade submitted the by-laws to the Commission on November 23, 1987, after the last of the directors' terms had expired. Wade claims that these by-laws, which reveal a crucial aspect of Workshop's organization and composition, existed and were in effect before Workshop's construction permit was granted in 1983. Several of Workshop's original eight directors contend that these by-laws have no validity, have never been in effect, and that Wade's statements to the Commission in this regard constitute misrepresentations to this agency.
In any event, Workshop, in failing to file these or other by-laws previously, violated Section 73.3613(b)(2) of the Commission's Rules. In addition, Workshop executed amended Articles of Incorporation on May 11, 1987, and failed to file these with the Commission at any time, in violation of Section 73.3613(b)(1) of Rules.

4. Wade was far more than only Workshop's communications counsel after its permit was granted on April 15, 1983. By imposing the above- referenced "by-laws" upon Workshop, and particularly those

provisions for the expiration of the original eight directors terms, Wade was instrumental in causing a significant number of the original Workshop directors to withdraw from the affairs of the permittee. Wade also persuaded certain directors to remove other members of the board. In the resulting confusion, after the expirations, resignations, and removals, Wade finally emerged as a director along with his sister Rosa Ware, who was the only director remaining from among the original eight. These changes in the composition of the board were not reported to the Commission in a timely manner via ownership reports or otherwise, nor was permission sought from the Commission to transfer control of the permittee, pursuant to Section 310(d) of the Communications Act of 1934, as amended. During this period of time, through his sister and under his own authority, Wade controlled Workshop's finances; initiated negotiations regarding broadcasting equipment, financing, and programming for the station; and concluded agreements and signed contracts on behalf of Workshop with equipment suppliers, various lenders and creditors, and program suppliers.

5. The composition of Workshop at the present time is unclear. Two groups claim to constitute the permittee. The Wade group consists of Wade, his sister Ware, and newly appointed directors Gwendolyn May and Hope Smith, elected by none of the original eight directors except for Ware. The second group consists of Mary Woodfork, Clint Wilson, and Gary Cordell, who were three of the original eight directors whose terms have expired according to the Workshop "by-laws." Each group has attempted to act on behalf of the permittee and disputes the other's legitimacy. In this regard, even though Wade now claims to be a Workshop director and

its chief executive officer, Woodfork and her group deny that Wade was legitimately elected to either position.

Respectfully submitted,
Alex D. Felker
Chief, Mass Media Bureau

By: Charles E. Dziedzic
Chief, Hearing Branch

October 11, 1988

APPENDIX H

FEDERAL RULES OF EVIDENCE

RULE 615 (1)

EXCLUSION OF WITNESSES

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order on its own motion. This rule does not authorize exclusion of (1) a party who is a natural person.

APPENDIX I

47 C.F.R. 1.351

FEDERAL COMMUNICATIONS COMMISSION
RULES OF EVIDENCE

Except as otherwise provided in this subpart, the rules of evidence governing civil proceedings in matters not involving trial by jury in the courts of the United States shall govern formal hearings. Such rules may be relaxed if the ends of justice will be better served by so doing.

APPENDIX J

47 U.S.C. 309 (e)

APPLICATION FOR LICENSE

If, ..., a substantial and material question of fact is presented, the Commission ... shall formally designate the application for hearing on the ground or reasons then obtaining and ... specifying with particularity the matters and things in issue but including issues or requirements phrased generally.

APPENDIX K

47 U.S.C. 312 (d)

ADMINISTRATIVE SANCTIONS

In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission.

Supreme Court, U.S.
FILED
MAY 24 1996
CLERK

(2) (3)

Nos. 95-1672 and 95-1881

In the Supreme Court of the United States

OCTOBER TERM, 1995

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC., AND ARNOLD L. KUPETZ, TRUSTEE IN BANKRUPTCY, PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ROSA WARE, BOOKER T. WADE, JR., GWENDOLYN MAY-BARLOW, AND HOPE SMITH BYNUM, CONDITIONAL CROSS-PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the Federal Communications Commission's revocation of petitioners' construction permit was excepted from the automatic stay provision of the federal bankruptcy code as "an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power," 11 U.S.C. 362(b)(4).

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1672

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC., AND ARNOLD L. KUPETZ, TRUSTEE IN BANKRUPTCY, PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

No. 95-1881

ROSA WARE, BOOKER T. WADE, JR., GWENDOLYN MAY-BARLOW, AND HOPE SMITH BYNUM, CONDITIONAL CROSS-PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The judgment of the court of appeals (Pet. App. 5a-8a) affirming the final order of the Federal Communications Commission (FCC) is unpublished, but the decision is noted at 70 F.3d 639 (Table).

The final order and decision of the FCC (95-1881 Cross-Pet. App. 59a-93a), revoking petitioners' construction permit and disqualifying cross-petitioners

as broadcast permittees or licensees, are reported at 8 F.C.C. Rcd. 4192. Orders of the FCC denying a petition for reconsideration (Cross-Pet. App. 94a-103a) and denying review (Cross-Pet. App. 108a-109a) are reported at 8 F.C.C. Rcd. 8719 and 9 F.C.C. Rcd. 4477, respectively. An order denying a second petition for reconsideration (Cross-Pet. App. 104a-107a) is unreported. The initial decision of the administrative law judge (Cross-Pet. App. 1a-58a) is reported at 7 F.C.C. Rcd. 7819.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 1995. A petition for rehearing was denied on November 17, 1995. Pet. App. 10a. Petitioners filed a petition for a writ of certiorari on February 14, 1996, and by letter of the Clerk of the Court dated February 15, 1996, were granted leave to refile by April 15, 1996. The petition was refiled by that date and docketed on April 17, 1996 (No. 95-1672). Cross-petitioners filed a conditional cross-petition for a writ of certiorari on May 17, 1996 (No. 95-1881). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Communications Commission (FCC or Commission) exercises regulatory authority over the radio spectrum pursuant to the Communications Act of 1934, 47 U.S.C. 151 *et seq.* The Act charges the FCC with "maintain[ing] the control of the United States over all the channels of radio transmission" and "provid[ing] for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority." 47 U.S.C. 301. The Act further

provides that "no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license." *Ibid.*; see *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940) ("The policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license.").

The grant of a license confers a limited right, and the FCC retains regulatory authority over the use of the license during the license term. Licensees are required to comply with restrictions set forth in Title III, Part I of the Act, 47 U.S.C. 301-336, and governing regulations, 47 C.F.R. Pt. 73. A license may be suspended, modified, or revoked for violation of those rules. 47 U.S.C. 312(a). Furthermore, transfer or assignment of the license during the license term, as well as renewal of the license, are subject to FCC approval. 47 U.S.C. 307(c), 309(h) and (k), 310(d). Section 307(a) directs the Commission to exercise its licensing authority in the "public convenience, interest, or necessity." 47 U.S.C. 307(a); see also *Regents of Univ. Sys. of Georgia* v. *Carroll*, 338 U.S. 586, 598 (1950).

2. The automatic stay provision of the Bankruptcy Code, 11 U.S.C. 101 *et seq.* (Code), provides for a broad stay of litigation, lien enforcement, and other actions that would interfere with the property of a debtor's estate. 11 U.S.C. 362(a). In particular, Section 362(a)(1) provides that the filing of a petition in bankruptcy operates as a stay of "the commencement or continuation * * * of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title." 11 U.S.C. 362(a)(1). Section 362(a)(2) stays "the enforcement,

against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title." 11 U.S.C. 362(a)(2). The purpose of the stay is twofold: to provide the debtor a "breathing spell" from his or her creditors, and to protect creditors from a race on the debtor's assets. See H.R. Rep. No. 595, 95th Cong., 1st Sess. 340 (1977).

The automatic stay is not absolute, however, and Congress has enumerated a series of exceptions in 11 U.S.C. 362(b). In particular, the filing of a petition in bankruptcy does not operate as a stay "under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." 11 U.S.C. 362(b)(4). Likewise, the statute precludes a stay "under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." 11 U.S.C. 362(b)(5). Together, those provisions permit a governmental body to commence, continue, and enforce an action against the debtor or his or her estate, where that governmental body is acting to protect its regulatory, rather than purely pecuniary, interests.

3. Petitioners in this case are Black Television Workshop of Los Angeles, Inc. (BTW), a non-profit corporation, and Arnold L. Kupetz, its trustee in bankruptcy. Conditional cross-petitioners have all served as officers and directors of BTW. In 1983, the FCC granted BTW a construction permit for

a noncommercial television station.[1] Several years later, three members of BTW's board of directors notified the FCC of a dispute over control of the corporation, and an FCC investigation revealed substantial questions concerning BTW's qualifications to be a permittee or licensee. After a lengthy hearing, an administrative law judge revoked BTW's construction permit, pending appeal. 95-1881 Cross-Pet. App. 1a-58a. The ALJ found, *inter alia*, that there had been an unauthorized transfer of control of BTW, in violation of 47 U.S.C. 310(d), and that BTW's initial applications and subsequent dealings with the Commission were "replete with instances" of misrepresentations and lack of candor. *Id.* at 47a-49a. On appeal, the Commission upheld the findings and conclusions of the ALJ. *Id.* at 59a-93a. A subsequent petition for reconsideration was denied, *id.* at 94a-103a, as were a further petition for reconsideration, *id.* at 104a-107a, and a self-styled application for review, *id.* at 108a-109a.

BTW sought review in the court of appeals and, on the same day, filed a petition in the bankruptcy court for reorganization under Chapter 11 of the Code. BTW then filed a motion for remand in the court of appeals, arguing that the automatic stay provision of the Code precluded the FCC from taking further action concerning the revocation of BTW's construction permit. In a brief, unpublished order, the court

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[1] Pursuant to 47 U.S.C. 319(a), the FCC licensing process is initiated by the grant of a construction permit. Upon completion of the station within the time specified, and upon a showing that the permit's terms, conditions, and obligations have been satisfied, the Commission will grant the permittee a license in the public interest. 47 U.S.C. 319(c).

denied the motion, holding that "[t]he [FCC's] action is excepted from the automatic stay provisions of the bankruptcy code." Pet. App. 2a (citing 11 U.S.C. 362(b)(4)). BTW then filed a motion for rehearing and suggestion for rehearing *in banc* concerning the motion to remand, which the court of appeals denied. *Id.* at 4a. During this time, BTW's bankruptcy case was converted to a Chapter 7 liquidation proceeding, and Kupetz was appointed trustee.

After argument on the merits, the court of appeals affirmed the decision of the FCC in a brief, unpublished judgment, finding "ample evidence on the record to support the FCC's decisions." Pet. App. 6a-7a.[2] One month after the court entered its judgment, and eight months after his appointment in the bankruptcy case, Kupetz filed his first appearance in the court of appeals, seeking substitution of parties, vacatur of the court of appeals' judgment, and remand to the FCC to permit negotiation of a settlement. BTW also filed a petition for rehearing and suggestion for rehearing *in banc*. In unpublished orders, the court of appeals denied both Kupetz's motion and BTW's petition. *Id.* at 9a, 10a, 11a.

ARGUMENT

Petitioners' objections to the court of appeals' ruling lack merit. The court of appeals' decision is consistent with the rulings of this Court and is not in conflict with any decision of another court of appeals. Further review is not warranted.

1. a. The court of appeals correctly concluded that "[t]he [FCC's] action is excepted from the automatic

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[2] The court did not revisit its earlier ruling on the non-applicability of the automatic stay.

stay provisions of the bankruptcy code." Pet. App. 2a (citing 11 U.S.C. 362(b)(4)). Section 362(b)(4) provides that the automatic stay does not apply to the commencement or continuation of a proceeding by a governmental unit to enforce its police or regulatory power. 11 U.S.C. 362(b)(4).

> Paragraph (4) excepts commencement or continuation of actions and proceedings by governmental units to enforce police or regulatory powers. Thus, where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay.

S. Rep. No. 989, 95th Cong., 2d Sess. 52 (1978).

Section 362(b)(5) works in tandem with Section 362(b)(4), to permit entry of all judgments and enforcement of all non-monetary judgments obtained under Section 362(b)(4).

> Paragraph (5) makes clear that the exception extends to permit an injunction and enforcement of an injunction, and to permit the entry of a money judgment, but does not extend to permit enforcement of a money judgment. Since the assets of the debtor are in the possession and control of the bankruptcy court, and since they constitute a fund out of which all creditors are entitled to share, enforcement by a governmental unit of a money judgment would give it pref-

> erential treatment to the detriment of all other creditors.

S. Rep. No. 989, *supra*, at 52.

Courts have applied two tests, the "pecuniary purpose test" and the "public policy test," to determine whether particular governmental actions are entitled to the regulatory powers exception to the automatic stay provision. The pecuniary purpose test asks whether the governmental action relates primarily to matters of the public interest, health, and safety, or rather merely to the protection of the government's pecuniary interest in the debtor's property. See, *e.g.*, *NLRB* v. *Continental Hagen Corp.*, 932 F.2d 828, 833 (9th Cir. 1991); *Eddleman* v. *United States Dep't of Labor*, 923 F.2d 782, 790 (10th Cir. 1991); *United States* v. *Nicolet, Inc.*, 857 F.2d 202, 209 (3d Cir. 1988). The public policy test distinguishes between governmental proceedings that aim to effectuate public policy and those that adjudicate private rights. *Continental Hagen*, 932 F.2d at 833; *Eddleman*, 923 F.2d at 790; *Nicolet*, 857 F.2d at 209. Both tests aim at discerning whether the governmental unit is acting in a regulatory capacity—to effect compliance with laws that it administers—or in a pecuniary or "private" capacity—to recover money owed it as a creditor.

Only in the latter case does the governmental unit stand in the position of any other creditor, such that its efforts to obtain a monetary judgment will be subject to the stay. By contrast, in the former case the action will fall squarely within the exception carved out by Section 362(b)(4). See *Continental Hagen*, *supra* (since enforcement of unfair labor practice laws satisfies both tests and is excepted from

stay, entry of cease and desist order and monetary relief permissible, though enforcement of monetary relief stayed); *NLRB* v. *Edward Cooper Painting, Inc.*, 804 F.2d 934 (6th Cir. 1986) (unfair labor practice proceeding excepted from stay); *Penn Terra Ltd.* v. *Department of Envt'l Resources*, 733 F.2d 267 (3d Cir. 1984) (enforcement of state environmental protection statute excepted from stay); *In re Missouri* v. *United States Bankruptcy Court*, 647 F.2d 768 (8th Cir. 1981) (enforcement of State's grain laws, where primarily related to protection of State's pecuniary interest in debtor's property, not excepted from stay), cert. denied, 454 U.S. 1162 (1982).

The court of appeals here correctly applied the plain language of the statute, which exempts actions involving a "governmental unit's police or regulatory power[s]" from the automatic stay. 11 U.S.C. 362(b)(4) and (5). As this Court has recognized, "the Commission's regulatory powers center around the grant of licenses." *Carroll*, 338 U.S. at 599. The Commission is directed to exercise that power in the "public convenience, interest, [and] necessity." 47 U.S.C. 307(a); see *Carroll*, 338 U.S. at 598. When the Commission acts to enforce compliance with its governing statute and regulations, and to assure use of the radio spectrum in the public interest, it acts to protect its regulatory, rather than pecuniary, interests. The FCC's action revoking BTW's construction permit was purely regulatory in nature, and thus is exempt from the stay.

The judgment of the court of appeals is also consistent with interpretations of the governmental regulatory powers exception made by other federal courts. In many analogous contexts, courts have held that various license revocation-type actions fall

within the governmental regulatory powers exception to the automatic stay. See, *e.g.*, *In re Wade*, 948 F.2d 1122 (9th Cir. 1991) (disciplinary proceedings against attorney excepted from automatic stay); *In re Professional Sales Corp.*, 56 B.R. 753 (N.D. Ill. 1985) (revocation of status permit for operation of hazardous waste site excepted from stay); *In re Carlton Fruit Co.*, 86 B.R. 254 (Bankr. M.D. Fla. 1988) (imposition of conditions upon citrus dealer's license excepted from automatic stay); *In re Sam Daily Realty, Inc.*, 57 B.R. 83 (Bankr. D. Haw. 1985) (suspension of realtor's license and imposition of judgment of fine excepted from automatic stay; enforcement of payment of fine subject to stay); *In re Arminio*, 38 B.R. 472 (Bankr. D. Conn. 1984) (revocation of driver's license excepted from automatic stay).[3]

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[3] This Court's decision in *Board of Governors* v. *MCorp Financial, Inc.*, 502 U.S. 32 (1991), is not to the contrary. *MCorp* held that administrative proceedings by the Board of Governors of the Federal Reserve to enforce regulations concerning the operation of bank holding companies are excepted from the automatic stay under Section 362(b)(4). In its argument, MCorp had contended that the "ultimate objective" of the proceedings was to "exercise control of corporate assets." *Id.* at 40. Hence, MCorp asserted, Section 362(a)(3), staying any act to obtain possession of, or to exercise control over, property of the estate, precluded continuation of the administrative proceedings.

This Court ruled that Section 362(b)(4) clearly permitted the government to continue its enforcement proceedings. The Court stated that "[i]t is possible, of course, that the Board proceedings * * * may conclude with the entry of an order that will affect the Bankruptcy Court's control over the property of the estate." 502 U.S. at 41. The Court suggested that "[i]f and when" an order were entered interfering with

b. Despite the clear language of the statute, petitioners argue (Pet. 8-9) that a stay of any FCC revocation proceeding against a federal bankruptcy debtor is necessary "to protect creditors." In particular, petitioners assert (Pet. 9-10) that Section 362(b)(4)'s reference to "police or regulatory power" encompasses "enforcement of laws affecting health, welfare, morals, and safety, but not regulatory laws that directly conflict with control of the *res* or property by the bankruptcy court." That argument lacks merit.

Petitioners' argument is not supported by *In re Missouri* v. *United States Bankruptcy Court*, *supra*. That case addressed the ability of the State to seize and sell grain in the possession of the debtor. The court of appeals found that the grain laws that the State sought to enforce were "*primarily relate[d] to the protection of the pecuniary interest* in the debtors' property and not to matters of public safety or health." 647 F.2d at 776 (emphasis added). The court's general statement concerning "regulatory laws that directly conflict with the control of the *res* or property by the bankruptcy court," *ibid.*, thus has no bearing upon a case such as the instant one in which a substantial non-pecuniary regulatory interest is found to exist.

Petitioners also invoke (Pet. 12) *NLRB* v. *Continental Hagen Corp.*, *supra*, to bolster their

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the property of the estate in violation of Section 362(a)(3), "then it may well be proper" for the bankruptcy court to exercise concurrent jurisdiction. Petitioners' claim (Pet. 13)—that any final agency action "adversely affecting the license of [a] regulated business" may require a stay—does not follow from *MCorp*, which neither concerned a license revocation proceeding nor addressed the statutory provisions at issue here.

claim that a regulatory action must be stayed if enforcement "would be detrimental to creditors." That case does not support that proposition. Rather, *Continental Hagen* illustrates the distinction between the government as regulator and the government as creditor. The court of appeals recognized the authority of the NLRB to enforce its unfair labor practice laws, not only through the issuance of cease and desist orders, but also by ordering monetary relief. Noting, however, that *enforcement* of the monetary relief would be stayed—a proposition not contested by the government—the court of appeals relied upon the monetary judgment limitation of 11 U.S.C. 362(b)(5). Despite petitioners' assertion to the contrary (Pet. 12), the court made no reference to any generalized prohibition against enforcement where enforcing a judgment would be "detrimental to creditors."

Indeed, no court of appeals has ruled that the Code stays regulatory action otherwise permitted by the plain language of Section 362(b)(4) and (5) merely because of a "detrimental effect" upon creditors. The courts have acknowledged that, although the goal of preserving the corpus of the debtor's funds and estate is normally central to the statutory scheme, that policy may conflict with other important governmental goals. See, *e.g.*, *Eddleman*, 923 F.2d at 790 ("We must assume that Congress chose its language [in Section 362(b)(4)] with the full recognition that the exception would allow governmental actions to encroach on the court's control of debtors' affairs."). "In enacting the exceptions to section 362, Congress recognized that in some circumstances, bankruptcy policy must yield to higher priorities." *Penn Terra*, 733 F.2d at 278 (rejecting argument that State could

not enforce its environmental laws against debtor where compliance with injunction required expenditure of money to detriment of creditors); see also *In re Commerce Oil Co.*, 847 F.2d 291, 297 (6th Cir. 1988) ("[W]e decline to adopt [the] premise that preservation of the debtor's estate is of greater priority in the statutory scheme set forth by Congress in Title 11 than is the enforcement of environmental protection laws explicitly intended to be excepted from the automatic stay."). As the courts have recognized, despite the possibility of indirect effects upon creditors, Congress chose to establish express exceptions to the automatic stay.

2. a. Petitioners suggest (Pet. 9-11) that the opinion of the court of appeals is in conflict with a decision of a district court. However, the proposition cited by petitioners is contained in dicta, and any "conflict" created by the dicta of a district court does not warrant review by this Court.

In re Fugazy Express, Inc., 124 B.R. 426 (S.D.N.Y. 1991), appeal dismissed, 982 F.2d 769 (2d Cir. 1992), involved proceedings by a purchaser of an FCC license at an authorized trustee's sale against an unauthorized, but earlier, post-petition transferee. Not aware of the bankruptcy proceedings, the FCC had approved the first assignment of the license. Deciding who controlled the debtor's interest in the license post-petition, the district court acknowledged two critical facts: (1) any interest in the license was limited by the regulatory authority of the FCC, and (2) on the facts of the case, the question of the application of the stay provisions to regulatory proceedings by the FCC was not before the court. 124 B.R. at 431.

The court nevertheless asserted that "[t]he revocation of a license by the FCC does not affect the health or safety of the public, so there is no exemption to the stay under [Section 362(b)(4)]." 124 B.R. at 431. In light of the district court's express recognition that the applicability of the stay provisions to FCC regulatory proceedings was not before it, this statement is sheer obiter dicta. *Fugazy* thus has no bearing in fact or law on the question presented in this case.

b. Petitioners also argue that the decision of the court of appeals conflicts with FCC policy, as previously upheld by the court of appeals. Petitioners cite (Pet. 11) *Second Thursday Corp.*, 22 F.C.C.2d 515, recon. granted, 25 F.C.C.2d 112 (1970), for the proposition that the FCC must concur with a stay and defer to the bankruptcy court in order to protect creditors. *Second Thursday* is inapposite.

That case involved an application, by the licensee's trustee in bankruptcy, for assignment of the license to a bidder at auction, where allegations of wrongdoing had been made against the licensee but no adjudication had yet occurred. In such circumstances, where a proposed assignment is pending and claims against the licensee have not been adjudicated, the Commission has found that protecting innocent creditors is one factor to consider in approving the assignment, so long as the alleged wrongdoers would receive no benefit from the FCC's action. *Second Thursday* does not stand for the proposition that the FCC will stay all regulatory enforcement action against a licensee merely because the licensee has entered bankruptcy. Where wrongdoing has been clearly established and finally adjudicated, the FCC has a strong interest in assuring enforcement of its

governing statute and regulations in order to protect the public interest committed to the agency's charge.

3. Because the petition for a writ of certiorari should be denied for the foregoing reasons, this Court's Rule 13.4 requires that the conditional cross-petition also be denied.[4]

CONCLUSION

The petition and conditional cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1996

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[4] In any event, we note that the conditional cross-petition attempts to relitigate the facts of the construction permit revocation proceeding. Cross-petitioners' contentions were addressed in the initial decision of the administrative law judge, Cross-Pet. App. 1a-58a, and the decision of the full Commission, *id.* at 59a-93a, and the court of appeals correctly found "ample evidence on the record" to support the FCC's decisions, Pet. App. 6a-7a. None of cross-petitioners' fact-bound claims would warrant review by this Court.

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Case Nos. 95-1672 and 95-1881

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1995

ROSA WARE, BOOKER T. WADE, JR.,
GWENDOLYN MAY-BARLOW, AND HOPE SMITH
BYNUM, Joint Cross-Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,
Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

JOINT REPLY BRIEF OF CONDITIONAL CROSS-PETITIONERS FOR A WRIT OF CERTIORARI

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CROSS-PETITIONERS' REPLY BRIEF

Cross-Petitioners' Rosa Ware, Booker T. Wade, Jr., Gwendolyn May-Barlow, and Hope Smith Bynum, hereby submit their reply to the brief in opposition filed by the Respondents' Solicitor General and the Federal Communications Commission ("FCC").

The arguments of the Respondents show why the Court should grant the petition of Black Television Workshop of Los Angeles, Inc. and the related conditional cross-petition. Rather than directly address the key issues and cases raised by the petition and the conditional cross-petition, the Respondents obfuscate these key issues and cases in footnotes, or just simply ignore them.

I. The Court Should Grant the Petition of Black Television Workshop in Order to Resolve the Issue of the Applicability of the Automatic Stay Provisions of 11 U.S.C. 362 (a) of the Federal Bankruptcy Code to FCC License Revocation Actions.

The Respondents, at p. 15, of their brief in opposition contend that, because the petition of Black Television Workshop should be denied, the conditional cross-petition is required to be denied. However, the Court should grant the petition of Black Television Workshop in order to resolve the issue of the applicability of the automatic stay provisions of 11 U.S.C. 362 (a) of the Federal Bankruptcy Code to FCC license revocation actions.

This is an important Federal question of law. It deserves resolution by the Court because of the substantial impact of bankruptcy proceedings on the nation's

broadcasting industry and other Federally regulated businesses.

The key case governing resolution of the petition of Black Television Workshop is Board of Governors of the Federal Reserve System of the U.S. v. MCorp Financial, Inc., 502 U.S. 32 (1991). Therein, the Court addressed the issue of the applicability of the automatic stay provisions of 11 U.S.C. 362 (a) to an ongoing non-final administrative agency enforcement proceeding.

The Court held that the automatic stay did not apply to such ongoing non-final enforcement proceedings. However, the Court did state that if and when the agency's proceedings culminate in a final order, then it may well be proper for the Bankruptcy Court to exercise its concurrent jurisdiction in order to protect the property of the debtor estate. MCorp, 502 U.S. at 41-42.

In the case of Black Television Workshop, its license revocation is a final order of the FCC and is on judicial appeal. This is exactly the circumstance that the Court indicated would be subject to the automatic stay provisions of 11 U.S.C. 362 (a). Accordingly, the Court should grant certiorari in order to definitively resolve this important matter.

The protestations of the Respondents, at n. 3, that the MCorp decision is somehow not relevant to the circumstance of Black Television Workshop only underscores the need to grant certiorari. The Respondents erroneously contend that MCorp is not relevant because it did not

concern a license revocation proceeding, nor address the statutory provisions at issue here.

However, the Respondents ignore the fact that MCorp concerned an enforcement action against a Federally chartered bank and that the enforcement action had the potential to result in revocation of the bank charter, which is a Federal license. Moreover, the Respondents ignore the fact that the applicability of 11 U.S.C. 362 was squarely put into issue in MCorp and addressed by the Court. Id., 502 U.S. at 34-36 and 39-41.

The Respondents, at pp. 14-15, contend that the FCC is not required under its policies in Second Thursday Corp., 25 FCC2d 112 (1970), to stay all enforcement actions against a licensee merely because it has entered into bankruptcy. However, this is not the issue raised by the Petitioner.

The issue raised by the Petitioner is the FCC being required by a Federal Bankruptcy Court to stay a final order of revocation, not an ongoing enforcement proceeding. After the stay is entered, the FCC must then reconcile its revocation order with Federal bankruptcy policies protecting creditors. LaRose v. FCC, 494 F.2d 1145, 1150 (D.C. Cir. 1974). If the FCC is unable to reconcile its revocation order with Federal bankruptcy policies, then the Federal courts would resolve that issue on appeal. However, such issue is not now before this Court.

The Respondents fail to even acknowledge in their brief LaRose v. FCC, which requires the FCC to reconcile its policies, including revocation orders, with Federal

bankruptcy policies protecting creditors. This omission underscores why certiorari should be granted. The Respondents merely ignore key cases that contradict their arguments.

The Respondents, at pp. 3, 9, 11, and 13, suggest that an FCC license is not "property" of the debtor estate which would be subject to the jurisdiction of a Federal Bankruptcy Court. However, an FCC license is a "thing" of value and becomes property of the debtor estate at the time of filing the bankruptcy petition. L.B. Wilson, Inc. v. FCC, 170 F.2d 793, 798 (D.C. Cir. 1948). The FCC has heretofore recognized the jurisdiction of Federal Bankruptcy Courts over licenses as property of the debtor estate. O.D.T. International, 9 FCC Rcd 2575, 2576, para. 7 (1994).

Accordingly, the petition for writ of certiorari of Black Television Workshop raises important Federal questions of law requiring resolution by the Court, which the Respondents have either ignored or obfuscated in their brief. Thus, the petition should be granted.

II. The Court Should Grant the Conditional Cross-Petition Because the Respondents Fail to Respond to the "Denial of Due Process" Issues which were Raised by Ware, Wade, May-Barlow, and Bynum.

In their joint conditional cross-petition, Ware, Wade, May-Barlow, and Bynum raise important issues of Federal law as to denial of "due process" by the FCC. However, in their opposition brief, the Respondents fail to address or even

to acknowledge these issues and the matters raised therein.

Pursuant to Supreme Court Rule 15 (2), a brief in opposition should address any perceived misstatements of fact or law in the petition that bears on what issues would properly be before the Court if certiorari were granted. Any objection to consideration of a question presented based on what occurred in the proceedings below may be deemed waived, unless called to the Court's attention in the brief in opposition.

Accordingly, by not responding to or even acknowledging the denial of "due process" issues raised by the Cross-Petitioners, the Respondents' have waived any factual or legal objections they might have made disputing that the Cross-Petitioners were denied "due process" by the FCC. This failure to respond supports grant of certiorari.

In their opposition brief, at. n. 4, the Respondents merely refer to the joint conditional cross-petition as too "fact-bound" to warrant review by the Court because it attempts to relitigate the facts of the FCC proceeding. However, the joint conditional cross-petition clearly and succinctly raises six separate legal issues as to denial of "due process" by the FCC.

These issues are:

(1) Whether Rosa Ware was denied "due process" by the FCC's violation of Rule 615 (1) of the Federal Rules of Evidence in sequestering her from adverse witnesses?

(2) Whether Rosa Ware, Gwendolyn May-Barlow, and Hope Smith Bynum were denied "due process" by the FCC's attribution to them of purported disqualifying misconduct by Booker T. Wade, Jr.?

(3) Whether the Cross-Petitioners were denied "due process" by the FCC's failure to use the required "preponderance of [substantial] evidence" standard in determining disqualifying misconduct?

(4) Whether Booker T. Wade, Jr. was denied "due process" by the FCC's disqualification of him based upon allegations in which he had no notice?

(5) Whether Booker T. Wade, Jr. was denied "due process" by the FCC's disqualification of him based upon supposed representations by him which are not in the record?

(6) Whether the Cross-Petitioners were denied "due process" by the FCC's disqualification of them based upon a violation of a supposed FCC policy which does not exist?

These are legal issues, not a relitigation of the facts of the case. Moreover, these legal issues raise important questions of Federal law requiring resolution by the Court.

The FCC is the "gatekeeper" as to who is allowed to own or control broadcast stations, which are the most important medium of mass communications in this country. Its decisions as to who is qualified or not qualified to own or

control broadcast stations --- and thus be a trustee of a valuable public resource --- must be above reproach and must be in accordance with fundamental notions of fairness and "due process." Otherwise, the American people will have no confidence in the FCC's decision making process.

Accordingly, the joint conditional cross-petition for writ of certiorari of Ware, Wade, May-Barlow, and Bynum raises important questions of Federal law requiring resolution by the Court, which the Respondents have ignored. Thus, the joint conditional cross-petition should be granted.

Conclusions

WHEREFORE, in view of the foregoing, the petitions should be granted.

Respectfully submitted,

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Nos. 95-1672 and 95-1881

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC., AND ARNOLD L. KUPETZ, TRUSTEE IN BANKRUPTCY, PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ROSA WARE, BOOKER T. WADE, JR., GWENDOLYN MAY-BARLOW, AND HOPE SMITH BYNUM, CONDITIONAL CROSS-PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY BRIEF

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In The
SUPREME COURT OF THE UNITED STATES
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No. 95-1672

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC., AND ARNOLD L. KUPETZ, TRUSTEE IN BANKRUPTCY, PETITIONERS

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FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY BRIEF

The Respondents have taken the position that the automatic stay provisions of the Bankruptcy Code, 11 U.S.C. Sec. 362(a), do not apply here, because the FCC is enforcing its police or regulatory power, so its action

comes within the exceptions to the stay provisions in 11 U.S.C. Sec. 362(b)(4). However, Respondents mischaracterize the character of the relief Petitioner seeks and in so doing miss the point of the Petition for a Writ of *Certiorari* ("Petition"). Their erroneous approach highlights the violence that the FCC has done to established bankruptcy principles mandated by both Congress and the courts and underscores why an important federal question is at stake that requires disposition by this Court.

The Enforcement Power of the FCC Has Already Been Exercised in This Case and Will Not Be Undermined by a Grant of Relief.

The basic point of the Petition is that the enforcement power of the FCC has already been exercised in this case; and granting the relief requested by the Petitioner, a Trustee in Bankruptcy, under *Second Thursday Corporation*, 22 FCC 2d 515 (1970), *recon. granted*, 25 FCC 2d 112 (1970), will not undermine that exercise of power or undo any action the Commission has taken to protect the public interest. The FCC found that Black Television Workshop of Los Angeles, Inc. ("BTW") is not qualified to operate KEEF-TV in Los Angeles. If this case is remanded to the FCC for disposition consistent with bankruptcy law, it will not result in BTW operating KEEF-TV or holding any FCC authorization.

There are various ways in which the FCC may deal with the estate of the debtor on remand. However, the cardinal principal under *Second Thursday* is that those who have been found by the FCC to be unqualified shall receive no benefit from the ultimate disposition of the authorization. Only innocent creditors may benefit, and the FCC decides who is or is not "innocent." Thus under *Second Thursday*, (a) BTW cannot end up holding a license

or operating the television station, and (b) none of the principals of BTW whose actions led to revocation by the FCC may receive any financial benefit from the ultimate disposition of the authorization.[1] The Trustee does not quarrel with that result.

In other words, the only people who have anything at stake at this point are the innocent creditors of BTW, who stand to lose millions of dollars and whose interests have been wrongly ignored by the FCC. These creditors did nothing wrong, so there is nothing to be enforced against them. Thus no interest of the Government in preserving its enforcement powers is at stake.[2]

The bankruptcy laws have two important purposes. One is to relieve debtors of some of the consequences which might otherwise result from their inability to pay their debts -- to give them a "breathing spell."[3] The other is to salvage something for creditors from the debtor's estate. The Respondents are acting in violation of the intent of Congress with respect to innocent creditors, without the countervailing public policy considerations that the Respondents argue exist, because no one is seeking restoration of the license for KEEF-TV to either BTW or its principals. This Court must not permit such a result.

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[1] Even if the Conditional Cross-Petition for a Writ of *Certiorari* ("Cross-Petition") by Rosa Ware *et al.* is granted, neither BTW or its principals will hold the license or operate KEEF-TV, as the Cross-Petitioners do not seek that relief. Cross-Petition at p. 12.

[2] How value may be realized from the property of the bankruptcy estate without BTW or its principals holding a license or operating the television station is discussed *infra*.

[3] *See* legislative history cited in Respondents' Brief in Opposition at p. 4.

The Grant of Relief in This Case Will Not Result in the Creation of a Private Property Interest in a License and Need Not Generate Any Benefit for BTW or Its Principals.

A secondary aspect of the Respondents' argument is that there is no estate of the debtor that can yield funds for the benefit of creditors, because recognizing such an estate would violate the principle that no one may have a property interest in an FCC license. It is not necessary to find that the debtor has a private property interest in its authorization that can be asserted against the Government generally, in violation of 47 U.S.C. Sec. 301, for the Court to find that the FCC has violated important bankruptcy law precepts in this case. Moreover, as discussed *infra*, the there are many situations in which certain limited property interests in broadcasting stations have been recognized without violating 47 U.S.C. Sec. 301.

Substantial funds may be realized from the bankruptcy estate (a) without giving anything to BTW or its principals, and thus without recognizing any general property interest of theirs, and (b) indeed even without ever establishing the television station that BTW sought to build in Los Angeles. For example, the authorization for KEEF-TV may be assigned to a completely new party, in which neither BTW nor its principals have any interest, in return for a cash payment to the bankruptcy court to be distributed exclusively to innocent, FCC-approved creditors. Alternatively, it is even possible to obtain cash from a third party in return simply for exchanging frequencies with BTW (again subject to FCC approval) thereby transferring only BTW's frequency to a third party while deleting the KEEF-TV station authorization altogether.

The Court need not dictate which result obtains. The point is that Respondents have ignored all the possibilities in refusing to accept a *Second Thursday*

disposition. In other words, the only issue in this case arising from the Trustee's Petition is whether or not innocent creditors should be deprived of any recovery at all, not whether BTW or its principals should recover anything or be granted any property interest or whether the FCC's findings against them should be vacated. Thus a fundamental precept of the bankruptcy law is being violated without any offsetting benefit or the creation of any property right with adverse consequences in other contexts.

Respondents Have Misapplied Case Law and Have Improperly Distinguished Cases cited by Petitioner.

The cases cited by Respondents do not support their arguments, because their arguments are based on a faulty perception of the legal nature of the relief sought by the Petitioner/Trustee. Respondents further ignore, and fail to distinguish, the teaching of *LaRose v. FCC*, 494 F.2d 1145 (D.C. Cir. 1974), which indicates that the FCC is in fact legally bound to consider the rights of creditors under federal bankruptcy law, something it has failed to do here. When the facts are put in perspective, and it is understood that the FCC's disqualification findings against BTW and its principals need not be vacated or undermined for relief to be granted here,[4] BTW may remain disqualified, and the FCC's regulatory laws and regulations will remain fully enforced. However, purely innocent parties will receive at least some relief. Therefore, the decisions cited by

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[4] *La Rose* involved a situation similar to the instant one, where a licensee and its principals were found disqualified, but court-ordered relief was still provided for creditors without undermining the importance or precedential effect of the FCC's findings and conclusions in the case. Moreover, as is the case here, the court intervened after the FCC had completed its proceedings and rendered an adverse decision against the licensee.

Petitioner are relevant, and Respondents' attempt to distinguish them based on an argument that the FCC's enforcement power would be undermined are faulty.

Respondents' attempt to distinguish *Board of Governors of the Federal Reserve System of the U.S. v. McCorp Financial*, 592 U.S. 32 (1991) in a footnote, based on the fact that a different regulatory statute is involved, is unavailing. The direct parallel with *MCorp* would be the question of whether a bankruptcy court could stay the FCC's hearing on the revocation of BTW's construction permit if that hearing were still in progress. But the hearing has been completed, so that issue is not before the Court. All that is left is the question of whether economic value for the benefit of creditors may be realized from the bankruptcy estate, which is exactly where the Court in *MCorp* said that judicial intervention may be required and where the Court said that the bankruptcy court has jurisdiction.

The FCC Has Previously Recognized Property Interests in the Disposition of a License and Granted Other Relief To Protect Creditors in a Bankruptcy Context.

It must be noted that the FCC is acting inconsistently with its own precedents, as it has recognized that creditors may have a property interest in the proceeds of disposition of a license, even if they may not take a direct security or other property interest in the license itself. In so holding, the FCC has specifically recognized and discussed the kind of conflict among bankruptcy courts that Petitioner seeks to have the Court resolve here. *Walter O. Cheskey*, 9 FCC Rcd. 986 (Common Carrier Bur., 1994) (FCC endorses *In re Ridgely*, 139 B.R. 374 (Bkrtcy. D. Md. 1992) and rejects *Tak Communications*, 985 F.2d 916 (7 Cir. 1993)).

Further, in *Diamond Broadcasting of California, Inc.*, FCC 96-245 (slip op.), released June 17, 1996, the

Commission rescinded a forfeiture against a broadcast licensee where the license had been assigned to a receiver in bankruptcy, because "the imposition of a forfeiture in this case would impact only innocent creditors."

The FCC's recognition of creditor expectations in *Cheskey* and *Diamond*, especially where, as here, there is no impairment of the agency's enforcement power, contrasts with its disregard of the position of the Trustee and creditors in this case and significantly undermines the Respondents' position.

CONCLUSION

In light of the foregoing, it is respectfully submitted that important federal questions are presented in this case, the bankruptcy laws have been wrongly undermined by the proceedings below, there are circuit court decisions in Petitioners' favor, and prior law requires clarification and consistency which only this Court can provide. Therefore, *Certiorari* should be granted.

Respectfully submitted,

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June 1996